In the Supreme Court of the United States

October Term, 1949

E. M. Powell, et al., *Petitioners*

v.

The United States Cartridge Company

[illegible] Labor, Etc., et al., *Petitioners*

[illegible], *Intervening Petitioner*

[illegible]

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No. 96

R. M. POWELL, ET AL., *Petitioners*

v.

THE UNITED STATES CARTRIDGE COMPANY

No. 79

JULIA RHODA AARON, ETC., ET AL., *Petitioners*

v.

FORD, BACON AND DAVIS, Incorporated

No. 58

ROY CREEL, ET AL., *Petitioners*

v.

LONE STAR DEFENSE CORPORATION

On Writs of Certiorari to the United States Courts of Appeals for the Eighth and Fifth Circuits

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

No. 96 (*Powell* case). The district court opinion (R. 916) is not officially reported. The opinion of the Court of Appeals for the Eighth Circuit (R. 982) appears at 174 F. 2d 718.

No. 79 (*Aaron* case). The district court opinion (1 R. 58) is reported at 70 F. Supp. 690, and the

opinion of the Eighth Circuit (3 R. 7) is reported at 174 F. 2d 730.

No. 58 (*Creel* case). The district court opinion (R. 95) is not officially reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 234) appears at 171 F. 2d 964.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit in No. 58 (*Creel* case) was entered on January 18, 1949 (R. 243), and it became final on February 7, 1949, when a petition for rehearing was denied (R. 247). The petition for certiorari was filed on April 21, 1949, and granted on June 6, 1949 (337 U. S. 923). In No. 79 (*Aaron* case), the judgment of the Court of Appeals for the Eighth Circuit was entered on April 12, 1949 (3 R. 33). On May 24, 1949, a petition for certiorari was filed and it was granted on June 27, 1949 (337 U. S. 955). In No. 96 (*Powell* case), the judgment of the Court of Appeals for the Eighth Circuit became final on May 7, 1949, when a petition for rehearing was denied and the court modified its opinion (R. 1038). The petition for certiorari was filed on June 3, 1949, and was granted on October 10, 1949. Nos. 79 and 58 (the *Aaron* and *Creel* cases) were at that time transferred to summary docket.

In each case the jurisdiction of this Court has been invoked under Title 28, United States Code, section 1254 (formerly section 240(a) of the Judicial Code).

QUESTIONS PRESENTED

1. Whether the Act of July 2, 1940, prescribed a complete system of labor relations which superseded or was intended to preclude the operation of the Fair Labor Standards Act with respect to defense and war production contracts made pursuant to the 1940 Act.

2. Whether Congress intended to exclude from the Fair Labor Standards Act employees working under Government contracts covered by the Walsh-Healey Act.

3. Whether persons employed pursuant to a cost-plus-fixed-fee contract between a private company and the United States to produce munitions for use in the prosecution of war are employees of the Government or of the private contractor.

4. Whether the munitions produced under such circumstances and shipped across State lines for use in the war are produced for "commerce" within the meaning of the Fair Labor Standards Act.

5. Whether the munitions produced under such circumstances are "goods" within the meaning of Section 3(i) of the Act.

STATUTES INVOLVED

The statutes involved are: Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201;[1] Walsh-Healey Public Contracts Act, June

[1] The Fair Labor Standards Act was amended on October 26, 1949 (c. 736, Public 393, 81st Cong., 1st Sess.), but the new amendments are not pertinent to the instant cases.

30, 1936, 49 Stat. 2036, 41 U. S. C. 35; Act of July 2, 1940, c. 508, 54 Stat. 712. The pertinent provisions of these statutes are reprinted in Appendix A to this brief, pp. 147-156.

SUMMARY STATEMENT OF FACTS

These three actions were brought pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 to recover unpaid overtime compensation and liquidated damages allegedly due petitioners for violations of the Act. In the *Powell* case (No. 96), the district court, after a full trial, rendered judgment in favor of petitioners (R. 916), but the Court of Appeals for the Eighth Circuit, sitting *en banc*, reversed the judgment (R. 982). In the *Aaron* and *Creel* cases (Nos. 79 and 58), the respondents' motions for summary judgment were granted by the respective district courts (*Aaron*, 1 R. 56; *Creel*, R. 95) and the judgments were affirmed by the Courts of Appeals for the Eighth and Fifth Circuits, respectively (*Aaron*, 3 R. 33; *Creel*, R. 243).

This statement is limited to a brief summary of the salient facts, which, we believe, are concededly substantially similar in all three cases. More detailed facts are set forth in the arguments on particular points.

A. General Nature of Respondents' Operations and Petitioners' Work

Respondents in all three cases were engaged from 1941 to 1945 in the manufacture and assembly of munitions of war for the Ordnance Department of the War Department. The completed munitions were shipped overseas for use in the prosecution of the war. The United States Cartridge Co. was a subsidiary of the Western Cartridge Co., which prior to the war production program engaged in the manufacture of ammunition (*Powell*, R. 707, 764). Ford, Bacon and Davis was in business as a general construction contractor, while the Lone Star Defense Corporation was established as a subsidiary of the B. F. Goodrich Rubber Co. (*Creel*, R. 254-255). The plant used by each respondent in the manufacture of munitions was newly constructed for that purpose under contracts with the Ordnance Department. The Lone Star Defense Corporation and the Western Cartridge Co. supervised and directed the construction by other contractors of the Lone Star and United States Cartridge plants, respectively (*Creel*, R. 255, 288; *Powell* R. 722), while Ford, Bacon and Davis itself constructed the plant it used (*Aaron*, 2 R. 25).

Petitioners in the *Powell* case were employed as safety men. They inspected buildings, equipment, materials and the working practices of production employees, and they reported any unsafe conditions discovered (R. 5-6). In the *Aaron* case, petitioners worked as production employees and proc-

essed, assembled and loaded munitions (1 R. 4-5). In the *Creel* case, petitioners were employed as truck drivers, lift-fork operators, loaders and unloaders in the warehouse, transportation and maintenance departments of the munitions plant (R. 10).

B. Relationship between the Contractor and the Government

The contracts, employment relationships, and method of operation in all three cases were substantially the same. The three records together afford a complete and representative picture of the operations and relationships. All the contracts in question were cost-plus-a-fixed-fee contracts[2] under which the respondent agreed to manufacture or assemble a certain quantity of a specified kind of munitions in return for a fixed fee and reimbursement for its expenses. The Government held title to the plant and the equipment, and it furnished most of the powder and other necessary raw

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[2] The use of such cost-plus-a-fixed-fee contracts in the war production program was not novel. Out of a total of 143 billion dollars in contracts made by the War Department during the period from 1941 to 1946, over 40 billions were in the form of cost-plus contracts. (See testimony of Under-Secretary of War Kenneth C. Royall, Hearings before Subcommittee of the Senate Committee on the Judiciary on S. 70, 80th Cong., 1st sess., pp. 422-423.) Out of a total of 68 billion dollars in Navy contracts during the war period, 18 billions were in cost-plus contracts. (Statement by Assistant Secretary of the Navy W. John Kenney, Senate Hearings on S. 70, pp. 624-626.)

materials. The contractor, however, was to furnish all necessary materials not furnished by the Government and was permitted to use materials of its own manufacture (*Powell*, R. 771, 768; *Aaron*, 2 R. 41; *Creel*, R. 295, 300).

After the munitions had been manufactured or assembled by the contractor, they were "loaded for shipment by persons on the payroll of" the contractor (affidavit on behalf of defendant in *Aaron*, 2 R. 3; to the same effect, *Powell*, R. 344, 346, 355, 771; *Aaron*, 1 R. 54; 2 R. 41; *Creel* R. 268, 300) "in accordance with the Government's shipping instructions" (*Powell*, R. 771; *Aaron*, 2 R. 41; *Creel*, R. 300). The munitions were shipped on Government bills of lading to points that concededly were mostly outside the State (*Powell*, R. 345-346, 355, 373-374, 379-384; *Aaron*, 1 R. 54; 2 R. 3).

The provisions of the contract with respect to the relationship between the Government and the contractor, were essentially the same in each of the instant cases. It was agreed that the contractor would have possession of the plant and the equipment (*Powell*, R. 833, 834; *Creel*, R. 343, 352; see also *Powell*, R. 781, 788; *Creel*, R. 316, 320; *Aaron*, 2 R. 59, 64), and would operate the plant (*Powell*, R. 764; *Aaron*, 2 R. 24; *Creel*, R. 288), doing "all things necessary or convenient in and about operating and closing down of the Plant" (*Powell*, R. 770-771; *Aaron*, 2 R. 41; *Creel*, R. 300, 351). The "control and direction of the work" rested in the contractor (*Powell*, R. 792; *Aaron*, 2 R. 68; *Creel*,

R. 267, 323), who was designated as the "manufacturer" of the munitions (*Powell*, R. 783; *Aaron*, 2 R. 43; *Creel*, R. 302). As pointed out in detail *infra* (Point III), all the contracts contained provisions indicating that the contractor was intended to operate independently and not as the agent of the Government.

The contracting officer, who represented the Ordnance Department, was at all times to have access to the premises for the purpose of inspecting the work and examining the contractor's books pertaining to the cost of the work (*Powell*, R. 788; *Aaron*, 2 R. 64; *Creel*, R. 320). The contractor was to manufacture the munitions in accordance with specifications and production schedules furnished by the Ordnance Department (*Aaron*, 2 R. 11, 20; *Creel*, R. 83). Further, the contractor agreed to furnish the contracting officer with a statement of the administrative procedure "to be followed by the Contractor for the control or direction of the work" (*Powell*, R. 792; *Aaron*, 2 R. 68; *Creel*, R. 267, 323), and a schedule of all wage rates and job classifications established by the contractor (*Powell*, R. 792, 938; *Aaron*, 1 R. 55; 2 R. 143; *Creel*, R. 83). Each contract provided that if it were terminated due to the contractor's fault, the contracting officer could "enter upon the premises and take possession of the plant" for the purpose of completing the work (*Powell*, R. 781; *Aaron*, 2 R. 59; *Creel*, R. 316).

During most of the period covered by the contracts in the instant cases the relationship between the contractor and the Ordnance Department was subject to Ordnance's "Manual of Instructions for the Administration of Contracts."[3] These Instructions, applicable to "plants of contractors and at Government-owned plants, engaged in the fulfillment of cost-plus-a-fixed-fee contracts with the Ordnance Department" (Section I(A)), describe the relationship between the contractor and Ordnance as follows (Section I(G)(3), Appendix, *infra*, p. 158):

> Without minimizing the importance of the duties of the Contracting Officer's Representative, it is deemed advisable to remind him that it is *not* his function to take charge of the Contractor's plant or attempt to prescribe methods of manufacture. The Contractor is an independent Contractor, not an agent or employee of the Government. His contract requires him to produce a result, and the selection of the means to be employed in producing it is his responsibility. The Contracting Officer's Representative is stationed at the Contractor's plant, *first*, to see to it that the product delivered by the Contractor is in accordance with Government drawings and specifications, *second*, to make sure that the Government gets what it pays for, and *third*, to safeguard the interests of the Contracting

[3] The pertinent provisions of these instructions are printed in Appendix B, *infra*, pp. 157-171.

Officer and the Chief of Ordnance by verifying and preauditing every item for which Government funds are disbursed. [To the same effect, see Ordnance Procurement Instructions, pars. 9,002.1-9,002.3, 9,104.1; 2 War Law Service pars. 24,843 and 24,865, reprinted in Appendix D, *infra*, pp. 171-182.]

C. The Employment Relationship

Each contract specifically provided that the contractor would hire the employees and that they "shall be subject to the control and constitute employees of the Contractor" (*Powell*, R. 771; *Aaron*, 2 R. 41; *Creel*, R. 300, 351-352). The contractor agreed to comply with Federal and State labor laws applicable to private employers (*Powell*, R. 783, 790, 793, 826; *Aaron*, 2 R. 36, 39, 43, 70; *Creel*, R. 296, 297-298, 301, 306, 354). Reimbursement was promised for any bonuses or other extra wage payments it made, provided that such payments were "consistent with the Contractor's general employee relations policies throughout its organization" (*Powell*, R. 774; *Aaron*, 2 R. 48; *Creel*, R. 306, 356). While the contracting officer had authority to require the contractor to dismiss any employee for incompetence or in the national interest (*Powell*, R. 782; *Aaron*, 2 R. 65; *Creel*, R. 321), the contractor had the right to appeal any such order to higher War Department officials (*Powell*, R. 791, 831; *Aaron*, 2 R. 68; *Creel*, R. 323, 363). In order to secure reimbursement for its labor costs, the contractor had to submit to the con-

tracting officer for approval the names, classifications and wage rates of all new employees hired by the contractor, as well as any subsequent changes in the status of such employees (*Powell*, R. 938, 943, 951; *Aaron*, 1 R. 21; 2 R. 146). The contractor also submitted his payrolls for verification and certification (*Powell*, R. 776; *Aaron*, 2 R. 53; *Creel*, R. 309).

The records in all the instant cases disclose that the contractor did the actual hiring, promoting, discharging and paying of the employees (*Powell*, R. 190, 202, 207, 209, 210, 940; *Aaron*, R. 43, 46; 2 R. 17; *Creel*, R. 85, 259, 269). The *Powell* record reveals that the contractors specifically informed the employees that it was their employer (R. 189, 191-192, 194, 196, 198, 200), and both the *Powell* and *Aaron* records show that the notices of employment and other employment records were issued in the contractor's name (*Powell*, R. 321-327, 589, 597, 701, 611, 623, 625; *Aaron* 2 R. 155-161). The employees worked exclusively under the supervision and direction of the contractor's personnel, and their duties were prescribed by the latter's rules, regulations and bulletins (*Powell*, R. 69, 217, 466; *Aaron*, 1 R. 45-49; *Creel*, R. 258). This was in conformity with the Ordnance Procurement Instructions, which directed the contracting officer that if he had any criticism to make regarding the contractor's personnel, such criticism was to be made only "by direct contact" with the contractor's chief official at the plant (OPI par. 50,002.12; 2

War Law Service par. 25,203, reprinted in Appendix D, *infra*, pp. 180-182).

The respondent in the *Powell* case informed all of its employees, including petitioners, when they were hired that they would be paid in accordance with the overtime provisions of the Fair Labor Standards Act (R. 206). The records in the other two cases are somewhat sketchy with respect to the relationship between the contractor and the employees, but they reveal that in those cases, as well as in the *Powell* case, the contractor paid overtime compensation for all hours over forty a week which it regarded as working time. The only employees excluded from such overtime payments were those whom the contractor classified as exempt "administrative" or "executive" employees under Section 13(a)(1)[4] of the Fair Labor Standards Act (*Powell*, R. 689, 692, 939; *Aaron*, 2 R. 128, 144; *Creel*, R. 251, 270-275, 278). The instant cases involve the claims of employees who were classified as exempt under Section 13(a)(1) (the *Powell* case) or who contend that they worked certain overtime hours which the contractor did not regard as time worked (the *Aaron* and *Creel* cases).

In general, the employment relationship appears to have accorded with the War Department's

[4] Section 13(a)(1) exempts from the minimum wage and overtime provisions of the Act "any employee employed in a bona fide executive, [or] administrative * * * capacity * * * (as such terms are defined and delimited by regulations of the Administrator)."

"Manual of Instructions" for the administration of its cost-plus contracts. These instructions described in detail the respective functions and status of the contractor and of the contracting officer's representative in the hiring and supervision of the employees working there, as follows:

> Under the provisions of Ordnance Department Cost-plus-a-fixed-fee Contracts the Contractor is responsible for the hiring, firing, and working conditions of employees on the project and, subject to the approval of the Contracting Officer, the determination of their wages and hours. The Contractor must furnish and supervise all labor required for the performance of the work and the employees thus furnished are those of the Contractor and in no sense those of the Government. The Contractors is responsible for its relations with its employees.
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> The Fair Labor Standards Act applies to every employee (except those specifically exempted thereunder) engaged in interestate commerce or in the production of goods for such commerce. Under this statute an employee is deemed engaged in "production" if he is employed in "any process or occupation necessary to the production" of goods. The interpretation of this definition is, at the present time, so broad as to include virtually all employees of Cost-plus-a-fixed-fee Contractors

except those specifically exempted by the terms of the statute.[5]

D. Defenses Advanced by Respondents

In the *Powell* case, the respondent, in reply to petitioners' claims, alleged below that the latter were exempt under Section 13 (a)(1) of the Fair Labor Standards Act, and raised certain defenses under the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U.S.C., Supp. II, 252 *et seq.*) and the Missouri statute of limitations. In addition, respondent denied that petitioners were engaged in the production of "goods" for "commerce" within the meaning of Sections 3(i), 3(j) and 7(a) of the Fair Labor Standards Act, basing its denial on various theories. It argued that commerce is restricted to "buying and selling," and since munitions produced under a "cost-plus" contract are not bought or sold, they were produced for "war" and not for "commerce." Further, it asserted that transportation by the United States of Government-owned goods is a mere administrative act of the Government and does not constitute "commerce." Finally, with respect to "production of goods for commerce," respondent claimed that the

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[5] Manual of Instructions for the Administration of Contracts (War Department; Office of the Chief of Ordnance; 1941), Sections X(A) and XI(I). To the same effect as the above instructions, see Ordnance Procurement Instructions, pars. 50,002.11; 50,002.12 (2 War Law Service par. 25,203). The pertinent provisions of these instructions are printed in the Appendix B, *infra*, pp. 157-171, and Appendix D, pp. 176, 182, respectively.

munitions, and the raw materials out of which they were produced, remained during the manufacturing process in the "actual physical possession" of the United States, rather than that of the contractor, so that the munitions were not "goods" within the meaning of Section 3(i).[6] Respondent further claimed that petitioners were covered by the Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U. S. C. 35) and that such coverage excluded them from the coverage of the Fair Labor Standards Act. It also contended that the Act of July 2, 1940 (54 Stat. 712), under which the cost-plus contract was made, set up a wholly new system of labor relations that excluded the operation of the Fair Labor Standards Act.

Respondent conceded, however, that petitioners were its employees and not those of the United States (R. 30, 34, 37-39), and it does not claim that it was an agent or instrumentality of the United States in the performance of its contract.

In the *Aaron* case, respondent made the same contentions as those advanced in the *Powell* case with respect to the production of goods for commerce and the Act of July 2, 1940. In addition, it claimed that in employing petitioners it had acted as an agent of the United States and, therefore,

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[6] Section 3(i) defines "goods" as meaning all commodities excepting "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

the exemption provided by Section 3(d)[7] applied. Respondent also alleged that plaintiffs' claims were barred by the Portal-to-Portal Act.

In the *Creel* case, respondent denied that petitioners were engaged in producing "goods" for "commerce," advancing the same general theories for that contention which appeared in the other two cases. It also relied on the Portal Act, the Texas statute of limitations, and the Section 13(a)(1) exemption of the Fair Labor Standards Act. Like respondent in *Powell*, however, it conceded that petitioners were its employees and it claimed no exemption under Section 3(d). (R. 16, 251, 252, 266, 268, 279.)

E. Decisions Below

The Court of Appeals for the Eighth Circuit, reversing the judgment for petitioners in the *Powell* case and affirming that for respondent in the *Aaron* case, adopted the wholly novel view that the Fair Labor Standards Act and the Walsh-Healey Act are mutually exclusive and that only the latter statute was applicable to petitioners. Although the court stated "It is clear and undisputed" that petitioners were covered by the Walsh-Healey Act, no evidence had been introduced in the district court with respect to their status under that Act. On the contrary, an exhibit offered by respondent

[7] Section 3(d) provides that the term "employer" "shall not include the United States."

in the *Powell* case revealed that it had classified petitioners as excluded from the Walsh-Healey Act (R. 611). Judge Johnsen filed a concurring opinion which adopted another novel concept, with Judges Sanborn, Woodrough and Riddick joining in that opinion as well as in the official opinion. The view expressed in the concurring opinion was that the Secretary of War, in providing for operation of Government-owned munition plants under cost-plus contracts, had power to establish whatever wage policies he desired "independent of the wage and hour provisions of any other statute" (R. 1000). Judge Johnsen stated that such power was implicit in the authority granted to the Secretary of War by the Act of July 2, 1940, to provide for operation of the Government plants "under such conditions as he may deem necessary" (Section 1(a)). Inasmuch as the cost-plus contracts in the *Powell* and *Aaron* cases specifically required the contractor to comply with the Walsh-Healey Act, Judge Johnsen concluded that the Secretary of War intended the contractor to comply with that Act but not with the Fair Labor Standards Act.

Neither opinion of the Eighth Circuit touched upon the "employment," or the "commerce," or the "goods," questions or on the other issues raised on appeal. The court called attention, however, to the fact that the respondent in the *Powell* case conceded that it was the employer of petitioners (R. 989).

The opinion of the Court of Appeals for the Fifth Circuit in the *Creel* case (R. 234), which affirmed the judgment for respondent, is one of five opinions of that court dealing with the applicability of the Fair Labor Standards Act to employees producing war materials under cost-plus contracts. The others are *Kennedy* v. *Silas Mason Co.*, 164 F. 2d 1016; *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. 2d 1012; *Reed* v. *Murphey*, 168 F. 2d 257, and *McDonald* v. *Kershaw, Butler, Engineers*, 172 F. 2d 798. In the *Silas Mason*, *Reed* and *Creel* cases, the court concluded that the Act was inapplicable, but in the *Adams* case, certain employees were held to be within the coverage of the Act. The *Kershaw, Butler* case was remanded to the district court "for retrial and resubmission." Upon remand, a compromise decree was entered awarding plaintiffs claimed unpaid overtime compensation without liquidated damages [See *infra*, p. 117, fn. 46].

In its *Silas Mason* opinion, the Fifth Circuit gave the following reasons for holding the Act inapplicable: (1) The munitions were not produced for "commerce," because they "were not manufactured for sale, nor were they ever intended or used for commercial purposes." Further, "transportation by the Government of Government owned munitions during war for use by its armed forces is not 'commerce'" (164 F. 2d 1016 at 1017); (2) munitions produced in Government-owned plants are not "goods" within the meaning of Section 3(i); (3) the cost-plus contractor was

an agent or instrumentality of the United States, bringing it within the Section 3(d) exemption. In the *Creel* case, the court held that the contractor was an agent of the United States,[8] and that it was not engaged in the production of goods for commerce.

SUMMARY OF ARGUMENT

All the Government agencies concerned with war production contracts, including the War Department, were agreed throughout the defense and war production program that cost-plus contracts were within the scope of the Fair Labor Standards Act. The labor policy announced by the National Defense Advisory Commission in the summer of 1940, and explicitly incorporated into both the Army and Navy procurement programs, recognized the applicability of the Federal labor laws (including specifically the Fair Labor Standards and the Walsh-Healey Acts) to national defense cost-plus-a-fixed-fee contracts. Every invitation for bids on, and every award of, such contracts was required to be conditioned upon compliance with these laws. Army Ordnance Department "Manual of Instructions" stated unqualifiedly that "The Fair Labor Standards Act applies to every employee (except those specifically exempted

[8] The Fifth Circuit's statement in the *Creel* opinion that "The contract in this case provided that appellee was operating the plant as a Government agency" (R. 236) is incorrect. The contract contains no such provision. Its provisions are essentially the same as those in the other four cases decided by the Fifth Circuit, and as the contracts in the *Aaron* and *Powell* cases (*supra*, pp. 7-8).

thereunder) engaged in interstate commerce or in the production of goods for such commerce." Legislative understanding and intent throughout the period accorded with this view. This appears from the refusal of Congress to pass any of the 20 odd bills introduced in the years immediately following our entry into the war proposing suspension or restriction of the overtime compensation laws. At the hearings on these legislative proposals all Government agencies concerned—including the War, Navy and Labor Departments and the War Production Board—were unanimously agreed, and so testified, that adherence to the statutory standards, far from hindering the war effort, would have a stabilizing effect, and that suspension of overtime compensation would indeed positively hamper war production.

None of the reasons advanced by respondents or the courts below for holding the Act inapplicable is consistent with the general understanding and assumption by everyone in 1940 and for years thereafter that employees of cost-plus contractors were subject to the Fair Labor Standards Act.

I

The defense that the Act of July 2, 1940, prescribed a complete system of labor relations superseding the operation of the Fair Labor Standards Act and other Federal labor laws is without any support in the terms of the statute and is conclu-

sively refuted by the legislative and administrative background.

The two statutes are in no way inconsistent. Concededly, the 1940 Act did not expressly suspend the Fair Labor Standards Act, although a number of other laws were suspended by specific reference. This omission from the 1940 Act, considered in the light of the express suspension of other statutes, seems clear indication that suspension of the Fair Labor Standards Act was not intended.

Not only are the legislative debates and history preceding the enactment of the 1940 Act significantly lacking in any such evidence, but the course of events subsequent to its enactment unquestionably confirms the view that suspension of the Fair Labor Standards Act was not contemplated. If the 1940 Act intended an exception as far-reaching as now asserted by respondents, not only was such intent unexpressed in the statutes or in any of the debates preceding its enactment, but it was completely overlooked by all Government agencies that might be concerned with it, including the War Department which presumably drafted and proposed the legislation to Congress.

The provision in the 1940 Act expressly preserving the Walsh-Healey Act carries no implication of intent to suspend the Fair Labor Standards Act, as the legislative history of that provision shows beyond doubt. The sole purpose of the proviso was "simply to remove the ambiguity" as to the appli-

cability of the Walsh-Healey Act to negotiated contracts. The 1940 Act, by permitting negotiated contracts without advertising for bids, might have taken certain previously covered Government contracts outside the terms of the Walsh-Healey Act (which applied to the usual Government contracts requiring advertising), unless it was made clear by specific provision that there was to be continued coverage by that Act. Since there was no similar possible conflict between the 1940 Act and the Fair Labor Standards Act, there was no occasion for a specific proviso on the Fair Labor Standards Act.

II

The Fair Labor Standards Act and the Walsh-Healey Public Contracts Act are not mutually exclusive. The statutes are not inconsistent, and neither contains any provision excluding the operation of the other. The Walsh-Healy Act requires employees on government contracts to be paid the wage prevailing in the community; the Fair Labor Standards Act fixes basic minimum standards for employees in interstate industry. The subsequent Fair Labor Standards Act sets the barrier below which the standards may not be relaxed in the absence of an express *legislative* exemption. Congress was very explicit in the Fair Labor Standards Act when it wished to exclude employees because they were regulated by other possibly overlapping Federal statutes. See Sec-

tion 13(a)(4), exempting employees subject to regulation under the Railway Labor Act, and Section 13(b)(1) and (2) exempting employees subject to regulation by the Interstate Commerce Commission. The absence of an express exemption for employees subject to the Walsh-Healey Act indicates clearly that no such exemption was intended. Furthermore, Section 18 provides that nothing in the Act "shall excuse noncompliance with any Federal or State law or municipal ordinance establishing * * * a higher standard than the standard established under this Act;" this would clearly seem to cover the Walsh-Healey Act.

The ten years of experience in administering the statutes also refute the view of the court below that "the two Acts are sufficiently divergent that both may not apply at one and at the same time" (174 F. 2d 718 at 725). While the two Acts may overlap in some instances, there is nothing inconsistent in their simultaneous application.

III

The employees of the contractors were not exempt from the Fair Labor Standards Act as employees of the United States. This has been conceded by respondents in both the *Powell* and *Creel* cases and was apparently assumed by the Eighth Circuit.

It is well established under this Court's decisions that persons working for a private corporation under a contract with the United

States are not employees of the United States, even though their service is performed on Government-owned property, under "supervisory" control by the Government, and at the expense of the Government through a cost-plus arrangement. Here each contract specifically provided that the contractor would hire the employees and that they "shall be subject to the control and constitute employees of the contractor." And each contract made clear the fact that the contractor had possession of the plant for the purpose of operating it. The contract provisions accurately described the actual employment relationship and the actual conduct of the parties in the performance of the contract. The "Manual of Instructions for the Administration of Contracts" issued by the Army's Ordnance Department, which was in effect during most, if not all, of the period of these contracts repeatedly instructed the Government contracting officer that "the contractor is an independent contractor, not an agent or employee of the Government," and provided that "the contractor must furnish and supervise all labor required for the performance of the work and the employees thus furnished are those of the contractor and in no sense those of the Government." The relations and dealings between the contractors and the employees show that in actual practice the contractor hired, promoted and discharged the employees, directed and controlled their work and handled all labor relations with them.

While concededly the contracts in these cases reserved to the Government a considerable degree of supervisory control (necessary because of the Government's financial responsibility and because of the dangers inherent in handling munitions and high explosives), this supervisory control was precisely of the same nature as the control exercised under the contracts involved in *Alabama* v. *King & Boozer*, 314 U. S. 1, and *Curry* v. *United States*, 314 U. S. 14. That the contractors in the instant cases were not simply agents or instrumentalities of the United States in the employment of petitioners is conclusively demonstrated by comparing the basic facts of the instant cases with the facts in *Alabama* v. *King & Boozer* and *Curry* v. *United States* on the one hand, and with those in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, on the other. The marked similarity of the instant cases to the *King & Boozer* and *Curry* cases is paralleled by the equally marked contrast between these cases and *Cosmopolitan Shipping Co.* v. *McAllister*.

IV

Munitions intended to be carried across State lines by the Government for war purposes are produced for interstate commerce. The Fair Labor Standards Act defines interstate commerce in Constitutional terms, to include "trade, commerce, transportation, transmission, or communication among the several States or from any State to any

place outside thereof." Since the munitions were produced for "transportation", from the State where they were produced to a "place outside thereof," they were produced for "commerce" within the literal terms of the statutory definition. It is established by many decisions of this Court that such commerce is not limited to interstate transactions for commercial purposes in the strict sense. Nothing in the language or purpose of the Act supports a restrictive interpretation, or suggests "that Congress intended that transportation effected by the Government or of Government goods be treated differently from all other transportation." See *Bell* v. *Porter*, 159 F. 2d 117, 119 (C.A. 7), certiorari denied, 330 U.S. 813.

Nor does there appear any valid reason or authority for divergence from the established concept of "commerce" by reason of the fact that the transportation is for war purposes. The powers granted to Congress under the Constitution were not mutually exclusive; the Government has frequently acted simultaneously under the "war" and "commerce" powers. The Department of Justice, the Wage and Hour Administrator, the National Labor Relations Board, the Comptroller General, and even the War Department have all been of the view that the shipment of Government owned munitions across State lines constitutes interstate commerce under the national labor legislation. Furthermore, in enacting the Portal-to-Portal Act, Congress predicated its findings on the assumption

that the employees of cost-plus contractors were subject to the Fair Labor Standards Act.

V

Section 3(i) of the Fair Labor Standards Act, which excepts from the definition of goods "goods *after* their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor," does not apply to respondents' manufacturing operations which occurred *before* the goods were delivered into the possession of the United States as ultimate consumer. Inasmuch as the exemption excludes the productive operations of the ultimate consumer, the result of the construction urged by respondents would be to subject to the Act the manufacturing operations of an ultimate consumer but to exempt the same operations if carried on by an independent manufacturer who sells to the ultimate consumer within the State but for interstate shipment. It would also mean that if an ultimate consumer takes delivery within the state the producers' operations are exempt, but if he takes delivery after interstate transportation the producers' operations are covered. The language, purpose, and history of Section 3(i) show that it was not intended to have any such capricious results, which would seriously impair the general coverage of the Act, but was designed to protect only *the consumer* from liability for transporting goods

produced under substandard conditions. The consistent administrative interpretation has limited the exemption to consumers, as Congress intended, and has not extended it to producers of goods for commerce. The circuit courts of appeals (except for the Fifth Circuit in some of its decisions) have come to the same conclusion.

ARGUMENT

Introduction

A. Nature of the Government's Interests and Position in These Cases.

As this Court stated in its opinion in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256, the issues presented by the petitions in these cases are "extremely important * * * probably affecting all cost-plus-fixed-fee war contractors and many of their employees." And, as the Court also pointed out, ultimately the Government is the main party in interest and to be affected by the determination of these issues. The Government's interest is a dual one, with possibly conflicting facets. It has a financial interest because, if the employees ultimately succeed in these cases, the expense may be reimbursable by the Government, and as indicated in the *Silas Mason* opinion, this may ultimately affect the cost of national defense. On the other hand, the Government also has a countervailing interest in the good faith enforcement of the Federal labor laws in accordance with the Congressional intent and the consistent Government policy

throughout the period of the performance of the contracts in question.

This Court's observation in the *Silas Mason* opinion that "The Government, the ultimate party in interest, appears through the Department of Justice in support of the statutory basis for the claims against itself" (334 U. S. at 254), suggests the need, at the outset, for a full explanation of the legislative and administrative background out of which this litigation has arisen. A review of this background will show beyond doubt that, far from being inconsistent, the position advanced in the brief *amicus* in *Silas Mason* and in this brief on behalf of the Government accords with the long-standing and carefully considered Congressional and administrative intent and policy. It was the consistent view of all the Government agencies concerned—including the responsible national defense and war-time agencies—throughout the defense and war production program, that cost-plus contracts were within the scope of the Fair Labor Standards Act, and such contracts were awarded and carried out upon the explicit understanding that they were subject to the Act. The view that the Federal labor laws apply to defense and war production contracts was not only regarded as both valid and sound by all responsible Government officials at the time the contracts in question were entered into and were being carried out, but was widely publicized as the official labor policy for the defense and war production program. Nor

was it a hastily or superficially considered position. It was based upon a careful weighing and debating of the purposes and effects of the laws involved and upon the virtually unanimous recognition that the application of the labor laws to war production contracts would in no way deter, but would be a positive benefit to, the Government's war effort.

Thus, far from being anomalous that the Government should support petitioners' position on the issues presented here, it would indeed be a breach of faith on the part of the Government to do otherwise. This does not mean that the Government supports the particular claims of any of the individual petitioners. Irrespective of the issues here presented, there still remains the question whether the particular petitioners have any valid claim in view of the various other defenses such as particular exemptions, defenses under the Portal-to-Portal Act, failure of proof, statutes of limitations. Even if the Court should rule in favor of the petitioners' position on all of the issues here presented, the decision would not be determinative of petitioners' right to recover. The other defenses are still available. So far as these other defenses are concerned, we take no position on the question of the validity of the claims.

The issues at present before the Court, however, relate to important and basic interpretations and policy regarding the application of Federal labor laws, which affect hundreds of thousands of em-

ployees who may work under similar Government contracts in the future as well as employees who worked under past defense and war contracts. The vast majority of employees working under such contracts have been paid in accordance with the statutory standards of the Fair Labor Standards Act. This was done pursuant to instructions from the Government contracting agencies, in accordance with the mutual understanding of the various Government departments concerned that the Fair Labor Standards Act was applicable to employees of such cost-plus contractors. That this law was generally applicable to such contractors was not questioned until the institution of litigation by employees who were thought to be within some exemption provision of the Act or as to whom there was some dispute regarding hours of work. For example, petitioners in the *U. S. Cartridge* case were foremen or safety inspectors who were believed to be employed in an "executive" or "administrative" capacity within the exemption provided by Section 13(a)(1), a defense still to be determined in the event the decision below is reversed. Employees involved in other cases have been firemen as to whom there has been a dispute as to what hours are to be counted as hours worked (e.g. *Bell* v. *Porter*, 159 F. 2d 117 (C. A. 7), certiorari denied, 330 U. S. 813). Similarly, the *Ford, Bacon & Davis* and *Lone Star Defense* cases involve disputes regard-

ing hours worked. Except for employees as to whom there was some such particular defense, the employees of cost-plus contractors were considered subject to the Act and were compensated accordingly throughout the years of the operation of these contracts.

Thus, while the Department of the Army now takes the view that the arguments advanced by respondents on the issues here presented have merit, this view clearly does not represent or reflect the Congressional understanding or the Government's position throughout the defense and war production period. The legislative and administrative background with respect to wage and hour regulations in war-time production shows conclusively that respondents' contentions with respect to the applicability of the Act (which includes *all* of the defenses under consideration here) are in direct conflict with the legislative intent and with the Government's (including the War Department's) official policy throughout the national defense and war production program.

It is because of these considerations, because of the governmental responsibility to see that the benefits of the Fair Labor Standards Act reach those who are entitled to them, even if the Government must bear the cost, and because we are convinced, as a matter of law, that there is no merit to the interpretation of the statutes adopted by the courts below, that this brief is submitted on behalf of the Government.

B. The legislative and administrative background demonstrates that it was generally assumed that the employees of Government cost-plus contractors were subject to the Fair Labor Standards Act.

1. *The consistent administrative understanding and express policy was that the Fair Labor Standards Act was applicable.*

As early as May 26, 1940, when the defense program was just commencing, President Roosevelt, in his National Defense Address, declared:

> But as the program proceeds there are several things we must continue to watch and safeguard, things which are just as important to the sound defense of a nation as physical armament itself. * * * we must make sure in all that we do, that there is no break-down or cancelation of any of the great social gains which we have made in the past years. * * * There is nothing in our present emergency to justify making the workers of our Nation toil for longer hours than now limited by statute. * * * There is nothing in our present emergency to justify a lowering of the standards of employment. Minimum wages should not be reduced. * * *. There is nothing in our present emergency to justify a breaking down of old-age pensions or unemployment insurance. * * * The policy and laws providing for collective bargaining are still in force. [86 Cong. Rec. App. 3244.]

On May 28, 1940, the National Defense Advisory Commission[9] was established, and a Labor Division

[9] The Advisory Commission, consisting of no more than seven members, was appointed pursuant to Act of Congress

was immediately created. Shortly thereafter, the following Statement of Labor Policy was drawn up and unanimously adopted by the Advisory Commission on September 1, 1940:

> All work carried on as a part of the defense program should comply with Federal statutory provisions effecting labor wherever such provisions are applicable. This applies to the Walsh-Healey Act, Fair Labor Standards Act, the National Labor Relations Act, etc. There should also be compliance with State and local statutes affecting labor relations, hours of work, wages, workmen's compensation, safety, sanitation, etc. [National Defense Advisory Commission's Report of Progress, "Labor Speeds Defense," p. 31.]

This statement of policy was widely publicized and was included in the text of the President's special message to Congress on September 13, 1940 (86 Cong. Rec., 76th Cong., 2d sess., p. 12114). It was also published in the October 4, 1940, issue of the official bulletin of the Advisory Commission (*Defense*, Vol. I. No. 6, pp. 7-8).

This labor policy was explicitly incorporated into the Army and Navy procurement programs in December 1940. Procurement Circular No. 43 is-

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of August 29, 1916 (39 Stat. 619, 649), by the Council of National Defense, composed of the Secretaries of War, Navy, Interior, Agriculture, Commerce and Labor. See "The National Defense Advisory Commission, Functions and Activities," December 28, 1940 (U. S. Government Printing Office 279485).

sued in that month by the Adjutant General's Office of the War Department contained the requirement that "every invitation for bids pertaining to national defense contracts will include the following":

> The general principles governing the letting of national defense contracts and the statements of labor policy adopted by the advisory commission to the council of national defense and approved by the President * * * will be the guide in the award of contracts under this invitation for bids * * * All work executed under any such contract * * * will be carried out in compliance with the provisions of the statement of labor policy relative to overtime pay and in compliance with Federal statutory provisions affecting labor wherever such provisions are applicable, as well as with State and local statutes affecting labor relations, hours of work, wages, workmen's compensation, safety, and sanitation. [5 F. R. 5122.]

The Navy adopted a similar procedure (Commission's Report of Progress, p. 31). The applicability of the Fair Labor Standards and Walsh-Healey Acts generally to war production contracts was spelled out in utmost detail by the Army's Ordnance Department in its "Manual of Instructions for the Administration of Contracts," the labor provisions of which are printed in Appendix B, *infra*, pp. 157-171. This "Manual" not only expressly and specifically recognized the applicabil-

ity of these two statutes to ordnance cost-plus contractors, but also emphasized that the contractor, and not the Government, was responsible as the employer under these contracts. Section XI of the Manual, entitled "Labor Laws," after stating that cost-plus-a-fixed fee contracts were subject to "Federal Labor Laws," explained as follows:

> *These statutes include not only the Walsh-Healey* ("Public Contracts) *Act* referred to in sub-section C. *f.* above, *but also various statutes not referred to in the contracts themselves such as the Fair Labor Standards Act of 1938*, and where appropriate the National Labor Relations Act, the Norris-LaGuardia Anti-Injunction Act, etc. Certain problems of frequent occurrence arising under the wages and hours provisions of the two former acts are of major importance and are considered below. [Italics supplied; Sec. XI, Subsection D(1). Appendix, *infra*, p. 163.]

Subsequent sections of the "Manual" gave further details on the applicability of the Fair Labor Standards Act as follows:

> [XI] G. *Fair Labor Standards Act Applicable to Cost-Plus-A-Fixed-Fee Contracts.*
>
> 1. The Fair Labor Standards Act (Wage-Hours Law) must also be considered applicable to Ordnance C. P. F. F. Contracts. The Fair Labor Standards Act as well as the Walsh-Healey Act prescribes minimum wage, maximum hours, and child labor employment

standards. It does not, as does the Walsh-Healey Act, provide for the regulation of health and safety. *

* * * * * *

3. Although no provision relative to the Fair Labor Standards Act is included in Government contracts, Contractors are nevertheless required to comply with it as well as the Walsh-Healey Act insofar as each may be applicable. * * * [Appendix B, *infra*, pp. 165, 166.]

In another provision, the Ordnance Manual stated unqualifiedly that "*The Fair Labor Standards Act applies to every employee (except those specifically exempted thereunder) engaged in interstate commerce or in the production of goods for such commerce*" (Section XI (I)(1), Appendix B, *infra*, p. 169; italics supplied). This additional explanation of the extent of the applicability of the Act to cost-plus-a-fixed-fee contractors followed:

Under this statute an employee is deemed engaged in "production" if he is employed in "any process of occupation necessary to the production" of goods. *The interpretation of this definition is,* at the present time, *so broad as to include virtually all employees of Cost-plus-a-fixed fee Contractors except those specifically exempted by the terms of the statute.* [Italics supplied; Section XI (I)(1), Appendix B, *infra*, p. 169.]

The Fair Labor Standards Act specifically exempts certain employees from its provisions. Of general application to Cost-plus-a-fixed-fee Contracts are those exemptions for employees employed in a bona fide executive, administrative or professional capacity as these terms have been defined by regulations issued under the Act. Contracting Officer's Representatives should consider the employees of the Contracting Officer subject to the provisions of the Fair Labor Standards Act unless and until it is demonstrated with reasonable conclusiveness that a given employee is within one of the several specific exemptions set forth in the statute. [Section XI (I)(4), Appendix B, *infra*, p. 171.]

The Army Manual also specifically recognized that the Walsh-Healey and the Fair Labor Standards Act standards might overlap, and therefore included detailed instructions for resolving "the overlap":

[XI] H. *Determining the Status of Individual Employees Under the Walsh-Healey Act and Fair Labor Standards Act.*

1. In resolving the overlap of the Walsh-Healey Act and the Fair Labor Standards Act for the purpose of determining their respective application, the full circumstances pertaining to the employment of each *individual* employee is controlling. Under both statutes determining coverage is an *individual* matter as to the nature of the employment of the par-

ticular employee and the classification or title which the employer may have is immaterial. * * *. [Appendix B, *infra*, p. 166; see also Ordnance Procurement Instructions, Appendix D, *infra*, p. 178.]

In describing various possible situations, the Army Manual pointed out that under certain circumstances "*either the Walsh-Healey Act or the Fair Labor Standards Act or both may be applicable*" (italics supplied):

> If * * * no applicable minimum wage determination had been made prior to the award of the Contract, the Walsh-Healey stipulation with respect to minimum wages is inoperative for the life of the contract, with the result that either the Walsh-Healey Act or the Fair Labor Standards Act or both may be applicable. In such case, the regulations issued under the Walsh-Healey Act require the Contractor to pay to each employee covered by the Act who works for a part of a day of a given work week, one and one-half times the "basic hourly rate" or piece rate for hours worked over eight that day or over eight upon any day that week or for all hours he works over 40 during that week, whichever is greater. The employee, however, may also be covered by the Fair Labor Standards Act, which prescribes a minimum wage of 30¢ an hour, an overtime compensation for hours worked in excess of 40 per work week at "not less than one and one-half times the regular rate at which he is employed". Official interpretations under each Statute furnish formulas for satisfying their

respective overtime requirements and calculating the wages or salaries due employees. These rulings are included in the Field Kit (see Section II) and should be consulted. That statute will apply which results in the greater yield to the employee. [Section XI (H) (2) (c), Appendix B, *infra*, pp. 167-168].

In "A Word of Warning," the Manual stressed that "The Contractor is an independent Contractor, not an agent or employee of the Government" (Section I (G) (3), Appendix B, *infra*, p. 158). This was again particularly emphasized in the sections on "Labor Relations" and "Labor Laws," which provided:

> Section X (A) (1). Under the provisions of Ordnance Department Cost-plus-a-fixed-fee Contracts the Contractor is responsible for the hiring, firing, and working conditions of employees on the project and, subject to the approval of the Contracting Officer, the determination of their wages and hours. The Contractor must furnish and supervise all labor required for the performance of the work and the employees thus furnished are those of the Contractor and in no sense those of the Government. The Contractor is responsible for its relations with its employees. [Appendix B, *infra*, pp. 159-160. See also Ordnance Procurement Instructions, Appendix D, *infra*, p. 176.]

Section XI (A). *Contractor's Responsibility for Compliance with Labor Laws*

> The Ordnance Department's Cost-plus-a-fixed-fee Contracts and the various Federal Labor Laws make it abundantly clear that the responsibility for compliance with the provisions of such laws is entirely the Contractor's. The Contracting Officer or his Representative may be consulted from time to time as to the details of such compliance and, indeed, in connection with his proper functions he may not ignore such violations of labor laws as come to his attention, but he has absolutely no responsibility in connection with the Contractor's compliance therewith. This responsibility is solely the Contractor's and the Contracting Officer's Representative's function in this connection is merely advisory.* * * [Appendix B, *infra*, pp. 162-163.]

Moreover, the Ordnance Procurement Instructions specifically provided that "representatives of the Wage and Hour Division of the United States Department of Labor will be accorded access to facilities and to records of cost-plus-a-fixed-fee contractors for the purpose of making investigations to determine applicability of and compliance with the Fair Labor Standards Act" [OPI 9,160, reprinted in Appendix D, *infra*, p. 179].

The applicability of the Fair Labor Standards Act was again reaffirmed, with express reference to cost-plus-a-fixed-fee contractors, in a memorandum dated September 30, 1941, from the office of the Under-Secretary of War, Director of Pur-

chases and Contracts, to the Quartermaster General. After quoting the Advisory Commission's labor policy statement, this memorandum stated:

> It is the opinion of this office that this policy was intended to apply to employees of cost-plus-a-fixed-fee contractors whenever applicable to employees of similar lump sum contractors [See 22 Comp. Gen. Dec. 277, 278].

The Secretary of War reiterated the opinion that the Fair Labor Standards Act was applicable to cost-plus-a-fixed-fee contractors in a letter to the Comptroller General dated August 25, 1942, inquiring as to the reimbursability of amounts paid by a contractor to claimants under the Fair Labor Standards Act (*ibid.*).

The applicability of the Act to war production contracts generally was again recognized in the President's Executive Order 9301, issued on February 9, 1943, which prescribed a minimum workweek of 48 hours but specified expressly that "Nothing in this order shall be construed * * * as suspending or modifying any provision of the Fair Labor Standards Act * * *" (8 F.R. 1825).

The respondents in the instant cases themselves recognized that the persons working under these contracts came within the general coverage of the Act. Thus, the United States Cartridge Co. specifically informed its employees that they would be paid in conformity with the Act's overtime provisions (R. 206). All three respondents classified each employee as either exempt or non-exempt

under the Section 13(a)(1) "executive" and "administrative" exemption (*Powell*, R. 321-327, 689, 692; *Aaron*, 2 R. 128, 144; *Creel*, R. 251, 270-275, 278)—a classification that would have been unnecessary if the Act was inapplicable. The files of the Wage and Hour Division are replete with inquiries from respondents and Ordnance Department officials regarding the status of particular employees under the Act—e.g., whether time spent in certain described activities should be included as time worked under the Act, whether particular employees were exempt "administrative" or "executive" employees, and whether certain deductions from employees' wages were permissible under Section 3(m) of the Act (See, for example, the letter from the Administrator to Lt. Col. William J. Brennan, Jr., with respect to time worked by firemen at the Ford, Bacon and Davis plant, which is reprinted in *Aaron* record at 2 R. 169-170). All of these inquiries were obviously made on the assumption that respondents were within the general coverage of the Act.

2. *Numerous proposals in Congress to suspend the statutory labor standards were unanimously opposed by the responsible Government agencies and were rejected by Congress.*

Following the entry of this Country into the War in December 1941, the War Department, along with the Navy and Labor Departments and the War Production Board, continued adherence to the view that the statutory labor standards were

applicable to war contractors. Throughout the period of agitation for legislation to suspend the overtime statutes, the War Department, along with all the other Government agencies concerned, persisted in the recognition of the applicability of the statutory standards, and agreed that adherence to such statutes had a positive stabilizing influence on war production. Some twenty-odd bills were introduced in Congress proposing the suspension or restriction of the overtime compensation laws,[10] and none of them was enacted into law. Some of these proposals called for blanket suspension of the statutory overtime provisions and some particularly specified contractors with the Navy and Army Departments for performance of labor essential to the war effort. All of the proposals unquestionably were directed primarily at Government war contracts, obviously on the assumption that the statutes in question required overtime compensation to employees working under those contracts.

One of the bills (H. R. 6790, known as the Smith Bill, "a bill to permit performance of essential labor on naval contracts without regard to laws and contracts limiting hours of employment, etc.")

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[10] House Bills Nos. 6616, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6826, 6835, 7054 and 7731, and Senate Bills Nos. 2232, 2373 and 2884 of the 77th Cong, 2d sess.; Smith Amendment in the House to S. 2208, 88 Cong. Rec. 1708, and O'Daniel amendments in the Senate to S. 2250 and S. 2748, 77th Cong., 2d sess.; 88 Cong. Rec. 3242-3243, 8653; House Bills Nos. 992; 1804 and 2071 and Senate Bills Nos. 190 and 237, 78th Cong., 1st sess.

was the subject of extensive hearings, at which the officials of the War, Navy and Labor Departments and of the War Production Board unanimously testified that war production might be harmed rather than helped by suspension of the overtime provisions of the Act. House Hearings before the Committee on Naval Affairs on H. R. 6790, 77th Cong., 2d sess. Similar testimony was also given before a Senate Committee investigating generally the progress of the war production program. See Senate Hearings before the Subcommittee of the Committee on Appropriations on H. R. 6736, Part II (on "Progress of the War Production Program"), 77th Cong., 2d sess.[11] Under-Secretary of War Patterson stated that suspension of the overtime provisions might cause such a "Violent change in the basis on which labor relations have been conducted" and consequently such "deterioration of labor relations" as actually to "result in decrease of production" (Senate Hearings, *supra*, p. 20; House Hearings, *supra*, p. 2476). He unqualifiedly asserted that "There is no occasion for their suspension" (House Hearings, *supra*, at p. 2477). To like effect, see statements of Assistant Secretary of Navy Bard, Senate Hearings, *supra*, at p. 38,

[11] One of the primary purposes for which these Senate hearings were held was to determine whether the overtime compensation statutes were deterring the war production program and therefore should be repealed or suspended (See letter sent by Committee Chairman Thomas to various Government officials and representatives of labor, Senate Hearings, *supra*, pp. 1-3).

House Hearings, *supra*, at 2541; by War Production Board Chairman Nelson, Senate Hearings, *supra*, pp. 48, 56; by William S. Knudsen, Director of Production, War Department, Senate Hearings, *supra*, at p. 43; by Secretary of Labor Perkins, Senate Hearings, *supra*, pp. 80-81, 92-93, House Hearings, *supra*, pp. 2626-2632. The testimony of these officials leaves no doubt that during the war all Government agencies were agreed that adherence to the statutory overtime standards had a stabilizing influence in that it reduced demands for increases in basic wages and prevented the agitation attendant upon such demands, and also afforded incentive for the necessary longer hours. And clearly they did not think this conclusion would operate "to fasten shackles on the nation's feet while it marches to war," or "otherwise to hinder the Government in the exercise of the sovereign function of providing for the common defense." See opinion of Fifth Circuit in *Silas Mason*, 164 F. 2d 1016 at 1019; cf. dissenting opinion of Judge Hutcheson, *ibid.*

Nor was the contention that adherence to the statutory standards might greatly increase the financial cost of the war overlooked. It was recognized that payment of statutory overtime compensation might cost the Government as much as 4 billion dollars on 56 billion dollars worth of war contracts then outstanding (in March 1942) (see House Hearings, *supra*, at p. 2553). But a careful and comprehensive consideration of the probable

effects of abandoning the statutory standards led to the unanimous agreement by the above officials that overtime compensation would in the long run be less costly and that abandonment of the statutory standards would be a very short-sighted move.[12] Indeed, even the National Association of

[12] The following statement of War Production Board Chairman Nelson represents the gist of the testimony of all of the Government officials (House Hearings, *supra*, p. 2576):

"To abolish the 40-hour week law would not in my opinion bring any greater production or more sustained effort in war industry. On the contrary, I believe that such action would have a harmful effect on war production.

"The average war worker has, of course, been getting time and one-half for all hours worked per week in excess of 40. Our national wage structure has been adjusted to that fact. Most war contracts are drawn with that fact in mind—and where they are not, the use of escalator clauses prevents the time-and-one-half rate from operating as a drag on extension of the workweek.

"If we now abolish the 40-hour week by law, we do not gain 1 hour of additional work in our war industries; but, naturally, we create a widespread demand for increases in wage rates, throw the entire wage structure out of adjustment, and remove an important incentive for labor to shift from nonessential industries into war-production jobs. In addition, we would, in my opinion, make labor relations in general worse rather than better."

See also statement of Secretary of Labor Perkins, Senate Hearings, *supra*, p. 93: "Premium rates for overtime encourage the use of second and third shifts of workers and thus promote the complete use of existing plant and equipment, with a resulting reduction of the unit cost to the Government. * * * the Government would not be the recipient of any saving in the field of lump-sum contracts, which comprise a large proportion of the total. Even in the case of cost-plus contracts any substantial saving to the Government through the suspension or lengthening of the statutory workweek is problematical. If the war industries surveyed by the Bureau

Manufacturers agreed that there would be "few practical benefits in the elimination of overtime", since any economies that might thereby be effected "would be more than offset, because it would have the additional effect of raising the wage costs even in plants which are now producing their maximum output without very much overtime" (House Hearings, *supra*, at 2844).[13] The incalculable ex-

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of Labor Statistics in January 1942 had worked the same hours but had paid straight-time wage rates, without any increase, to their labor (an impossible assumption) they would have decreased their wage bill about 7 percent. The saving in total cost, however, would have been less than 3 percent and no saving to the Government would have resulted under lump-sum contracts."

[13] "For many months employees in many industries have been used to weekly pay checks considerably higher than before, primarily because of high overtime rates. To decrease this weekly pay check by the amount of overtime in it—without simultaneously freezing wage rates at their existing levels—would have one definite tendency. In all probability, there would be a widespread demand by unions throughout the country for an increase in basic hourly rates to a point offsetting the loss of overtime. This would normally stimulate increased labor difficulties and even if it did not increase strikes, it would increase the time which management would be forced to take from our all-important projection [sic] job in order to sit around the negotiation table. I cannot believe that this would help production. * * * Consequently, for the immediate future, such companies see few practical benefits in the elimination of overtime. They believe that a primary effect on them of such action would probably be that of forcing an increase in basic wage rates for reasons outlined previously and a potentially disturbing upset in existing labor relationships." Statement of National Association of Manufacturers President William P. Witherow, House Hearings, *supra*, p. 2844.

pense and economic disruption that might result from the substantial reduction of take-home pay and the consequent demands for increases in basic wage rates, if overtime compensation were suspended, was an important consideration.[14]

[14] "The extra money earned by the worker in war industries through the time and one-half provision has done much to counterbalance the increase in living costs. If we suddenly should abolish that extra earning we would create confusion, disrupt our present wage structure, and inevitably create very strong demand for a general upward revision in wage rates so that the weekly rate can be kept." Statement of Donald Nelson, Senate Hearings, *supra*, p. 48.

"It has been the 40-hour week with the time and a half penalty for overtime after 40 hours which has proven to be a stabilizing influence in this period, just as it is anticipated that in the peacetime demobilization industry it will be a stabilizing influence. * * * You remember in the last war, one of the constant complaints was that nobody stayed on his job. Everybody went out and looked for a better job where he could make a little more money. In this particular recent period the key industries of shipbuilding, machine tool making, and of engine making, which are the items without which we would be paralyzed, have been relatively stable in their employment. The men have not gone out looking for other work, because as they say, 'With my overtime, I can make out very well here.' * * * Turn-over is one of the greatest possible reducers of production. It interferes with production more than any one thing, if you get a high turn-over rate, and the men leave. It always takes time to teach new men." Statement of Secretary of Labor Frances Perkins, Senate Hearings, *supra*, p. 80.

"* * * It is inconceivable that war plants would be able to reduce the weekly earnings of laborers by eliminating presently paid overtime premiums and still employ workers for existing hours without loss of efficiency. Elimination of overtime pay might precipitate a demand for increased basic wage rates to restore the former level of weekly earnings. As a re-

There were other highly important, more positive, gains that it was feared would be lost by suspension of the statutory overtime standards. It was repeatedly emphasized that overtime compensation had not only encouraged workers to shift from non-essential work to war production or to remain in their war production jobs, but that it also induced employers with war contracts to train second and third shifts, thus securing maximum use of war plants and equipment and building up a much needed pool of trained workers.[15] It was pointed out that the greatest need was for the con-

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sult the net cost of the Government would be at least as great as before, and the country would be left with a rigid structure of high wage rates in place of the flexible system which now exists." Statement of Secretary of Labor Frances Perkins, *id.* at 93.

[15] "The overtime pay which goes with the 40-hour week—time and one-half pay, usually—probably has a good deal of value as an incentive to labor to put in the extra hours which are so necessary at this time. * * * War industries today are working longer hours per week than are civilian industries; obviously, the overtime provision provides an incentive to the worker to shift from the latter to the former group." Statement of Donald Nelson, Senate Hearings, *supra*, p. 48.

"The elimination of all premium rates for overtime would remove one of the existing incentives in training new workers on the job. The existing overtime premiums assist in promoting the maximum use of the existing labor supply and in preparing the additional trained labor for the expansion of plant and machine facilities so necessary to meet the war needs." Secretary of Labor Frances Perkins, House Hearings, *supra*, p. 2632.

tinuous utilization of the productive machinery at the most efficient level, and that this could better be achieved by several shifts than by forcing the workers to put in long hours with no added incentive.[16] The officials concluded that the unstabilizing effects of labor dissatisfaction and turnover in war production industries, which suspension of the statutory standards would entail, could easily increase the cost of production far beyond the cost of overtime compensation, to say nothing of the demoralizing effect generally of abandoning the recently acquired social gains.

Neither the Smith Bill, nor any of the other numerous similar bills, were ever reported out of committee. However, the blanket suspension provisions of the Smith Bill were rejected by an overwhelming vote when proposed as an amendment to the Second War Powers Bill of 1942 (88 Cong. Rec., 77th Cong., 2d sess., p. 1708 ff., 1758). Two other attempts to attach similar amendments to other legislation were likewise rejected.[17]

At the same session at which the numerous un-

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[16] "What we are after is round-the-clock use of all available machinery, attained through the operation of three 8-hour shifts." Donald M. Nelson, House Hearings, *supra*, at 2577.

[17] O'Daniel proposed amendment to S. 2250 (on mobilization of small business for war production) (88 Cong. Rec., 77th Cong., 2d sess. 3242-43); and O'Daniel proposed amendment to S. 2748 (to amend the Selective Training and Service Act of 1940) (*id.* at 8653).

successful attempts were made to suspend the Fair Labor Standards Act, Congress adopted the War Labor Disputes Act of 1942, 57 Stat. 163, 50 U. S. C. App. 1501 *et seq.* The provisions of that statute clearly indicated that employees who worked in plants, mines and other facilities producing war materials under Government contract were to have the benefits of existing labor standards, including those of the Fair Labor Standards Act. Section 7(a) of the Act, in authorizing the War Labor Board to settle disputes that "may lead to substantial interference with the war effort" and to "provide by order the wages and hours and all other terms and conditions * * * governing the relations between the parties," specifically directed that such decisions of the Board "shall conform to the provisions of the Fair Labor Standards Act of 1938." And the Stabilization Act of 1942, 56 Stat 765, 50 U. S. C. App. 961 *et seq.*, expressly preserved the overtime provisions of the Fair Labor Standards Act as a part of the Country's wage stabilization program. Section 1 of that Act authorized and directed the President to stabilize the prices, wages and salaries affecting the cost of living "that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities." However, "No action shall be taken under authority of this Act with respect to wages or salaries * * * which is inconsistent with the provi-

sions of the Fair Labor Standards Act of 1938." [18] (Section 4.)

If there were any remaining doubt as to the Government's views with respect to the applicability of these statutes to war production contracts, it is completely dispelled by the "Joint Agreement of the War Department, the Navy Department, the War Production Board, the Maritime Commission, the Department of Labor, the National Labor Relations Board, and the War Manpower Commission, on the Desirability of Retaining Existing Federal Legislation Relating to Overtime Pay," issued January 25, 1943, and reprinted in Appendix C to the brief, *infra*, pp. 172-175. The agreement, after referring generally to the effect of the overtime provisions on the prosecution of the war, stated that "It is the best judgment of these departments and agencies, based on their individual and collective experience, that the abolition of existing overtime pay provisions of Federal legislation would hamper the war effort."

C. Government's Policy in Employees' Suits Against Contractors.

In line with this consistent position, the Department of Justice, in establishing the policy for defending suits brought by individual em-

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[18] Senator Brown, sponsor of the Stabilization Act in the Senate, explained during the course of debates that this provision "preserves for labor the provisions of the Fair Labor Standards Act relating to minimum wages, hours, and so forth" (88 Cong. Rec. 7207).

ployees against cost-plus contractors under the Fair Labor Standards Act, instructed the United States Attorneys not to assert, in cases in which they represented the contractors, the defenses going to the general applicability of the Act to cost-plus contractors, since it was the Department's opinion that such defenses lacked substantial merit and were not in the interests of the United States. For a time the Department also instructed the United States Attorneys to advise private counsel for the contractors that it was the Department's opinion that such defenses lacked substantial merit. A memorandum of agreement was entered into on December 23, 1943, signed by representatives of the War, Navy, Labor and Justice Departments, incorporating this policy.[19] This agreement was predicated, of course, on the basic assumption that the cost-plus contracts were within the scope of the Act. Nevertheless private counsel for the contractors raised such defenses in a number of cases, with the apparent approval of the Department of the Army and some of the other contracting agencies. It was at this juncture for the first time that there appeared any divergence of opinion in the government concerning the applicability of the Act. The Department of the Army, concerned

[19] See Hearings, Subcommittee No. 4 of the House Committee on Education and Labor on proposed Amendments of the Fair Labor Standards Act of 1938 (80th Cong., 1st sess., pp. 2728-2729).

with the cost of paying claims or defending numerous suits for wages claimed to be due under the Act, then took the view that the defenses had merit and should be asserted. At the instance of the Department of the Army, and of other contracting agencies, the above-described inter-agency agreement was abandoned and the policy adopted of permitting private counsel for the contractor to defend the suits with complete freedom to assert any defenses. However, the official Government position never changed, and the Department of Justice and the Department of Labor have consistently maintained the Government's position that these cost-plus contractors are subjects to the Fair Labor Standards and Walsh-Healey Acts.

We now turn to the specific contentions, firstly to the argument urged for the first time in this Court on behalf of the contractor in the *Silas Mason* case that the Act of July 2, 1940, superseded the Fair Labor Standards Act for employees of the cost-plus-contractors. Before doing so, however, we wish to reiterate that the general administrative and legislative understanding to which we have referred shows that in 1940 and for years thereafter it was assumed by everyone that such employees were subject to the Act. This understanding, which, we submit, reflects the congressional interpretation of the statute, is inconsistent with the contention that the Act is inapplicable for any of the reasons advanced by respondents or the courts below.

I

The Act of July 2, 1940, Did Not Prescribe a Complete System of Labor Relations Which Superseded or Was Intended to Preclude the Operation of the Fair Labor Standards Act.

A. The language and history of the Act of July 2, 1940, show no intent to supersede the Fair Labor Standards Act, but the contrary.

In the opinion in the *Silas Mason* case, this Court pointed out that the contention that the Act of July 2, 1940, prescribed a complete system of labor relations which superseded the Fair Labor Standards Act was "fully presented for the first time in the reply brief in this Court." 334 U. S. at 256. As shown by the above record of legislative and administrative conduct, this supposed legislative intent was thus discovered "for the first time" almost eight years after the enactment of the 1940 Act.

That Act—"to expedite the strengthening of the national defense"—authorized the Secretary of War to provide for the necessary construction of military plants and facilities and the production of munitions and war materials either by negotiating contracts "with or without advertising" or by constructing the plants and operating them with War Department personnel (Section 1(b), Appendix A, *infra*, pp. 148-156, where the entire Act is printed). Insofar as authority was granted to use "the unique hybrid relationship" (concurring opinion in the *Powell* case, R. 999) (i.e., Government-owned but privately operated), the

statute was concerned mainly with relieving the Secretary of War of the need to advertise and of the limitations of other *specifically enumerated* statutes, such as the monetary limitation on any individual construction project and the limitations with respect to the number of airplanes, airships and balloons that might be equipped and maintained. Concededly, the 1940 Act did not expressly suspend or refer to the Fair Labor Standards Act, although, as noted in detail below, a number of other laws were suspended in express terms. The only references to labor standards in the 1940 Act were in Sections 1(a), 4(b) and 5. Section 4(b) provides:

> Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics *employed by the War Department*, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics. [Italics supplied; Appendix A, *infra*, pp. 153-154.]

This provision on its face applies only to persons "employed by the War Department." If, as we

contend (Point III, *infra*, pp. 88-117), and as was conceded in the *Powell* case, petitioners are not employees of the War Department but of the respondents, the above quoted provision can have no application. If they were employees of the War Department they would have been exempt from the Fair Labor Standards Act as Government employees. Section 3(d).

Sections 1(a) and 5 contain a proviso that contracts made with manufacturers under the new law which would otherwise be subject to the Walsh-Healey Public Contracts Act shall not be exempt from that Act solely because the contracts are made without advertising. This proviso reads as follows:

> *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45) [the Walsh-Healey Act], shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section; [Appendix A, *infra*, pp. 150, 155.]

This provision obviously does not exempt anyone from the Fair Labor Standards Act. If the intent of the 1940 Act were as far-reaching as now contended, not only was such intent unex-

pressed in the statute or in any of the debates and discussions preceding its enactment, but it was completely overlooked by all Government agencies that might be concerned with it, including the War Department which (according to the reply brief in *Silas Mason*, p. 5) "drafted and presented to Congress the legislation which later became the Act of July 2, 1940." As already noted, the contention that the Act of July 2, 1940, created "a novel and revolutionary set-up" (see concurring opinion below in *Powell* case, R. 998) was suggested for the first time when the *Silas Mason* case was reached for argument in this Court in April 1948. It was there advanced, as a completely novel defense, in the reply brief of private counsel for the contractor. It had not theretofore been urged in any of the courts below and was not made in the main brief of respondent in this Court.

As indicated by the above-described record of the Government's uniform labor policy with respect to defense and war contracts, nothing either in the legislative history or in the administrative behavior gave any hint that either the so-called GOPO (Government-owned, privately operated) contracts or the cost-plus-a-fixed-fee contracts were regarded as a special class subject to different labor provisions from all other war production contracts. On the contrary, all of the evidence strongly indicates that no such distinction was intended. It is clear that prior to the enactment of

the 1940 Act, the labor policy for Government contracts applied without distinction to national defense production. The announcement of labor policy by the President in May 1940 (quoted *supra*, p. 33) was general and all-inclusive in its scope and drew no distinctions between kinds of war production contracts. Nor did anything in the Congressional debates and legislative history preceding the enactment of the July 1940 Act refer to any such distinction or suggest that any modification of, or exception from, the announced labor policy was contemplated by the proposed legislation.

The course of events subsequent to the enactment of the 1940 Act corroborates the conclusion that no such exception was contemplated. Barely a week after the 1940 Act was enacted, the President made public a letter from the Administrator of the Wage and Hour Division, which indicated clearly that the Fair Labor Standards Act was regarded as applicable to war contracts generally, and, particularly to "key defense" work such as was performed under the contracts in the instant cases (86 Cong. Rec. App. 4659-4660). Referring to the question raised in the newspapers "whether in the light of the national defense emergency it will be necessary to raise the ceiling for hours, above which time and one-half must be paid" (See Annual Report, Wage and Hour Division, 1940, Introduction, pp. XII to XIII), the Administrator's letter pointed out that, unlike the flat 40-hour week in effect in France from 1936 to 1938, there was no

rigid limitation on our "ceiling for hours," and concluded that it had not been demonstrated that in "the key defense industries * * * the payment of time and a half for overtime is making difficult their operation." Similarly, the National Defense Advisory Commission's Statement of Labor Policy (see *supra*, p. 34) on September 1, 1940—barely two months after the enactment of the 1940 Act—confirms the conclusion that there was no thought that the 1940 Act provided any broad exception from the labor standards. Indeed, since the July 1940 Act was enacted in the midst of persistent official emphasis upon preservation of the labor standards during the defense program, the clear presumption is that the intent was to incorporate that policy, in the absence of express or unmistakable evidence to the contrary. Such evidence is wholly lacking here. The present suggestion to the contrary is plainly a belated afterthought, not in accordance with the original intent.

B. The Fair Labor Standards Act is not among statutes specifically suspended by the 1940 Act.

Those statutes which the 1940 Act was intended to supersede were suspended in express terms. Thus, Section 1(a) provided for the suspension of Sections 1136 and 3734 of the Revised Statutes and of "any statutory limitation with respect to the cost of any individual project of construction." Section 2(a) suspended all "existing limitations" on the number of certain air corps personnel, and Section 3 suspended "all existing limitations"

with respect to the number of aircraft. Further, Section 1(b) authorized the Secretary of War to provide for the operation and maintenance of plants or facilities and to sell or lease such plants or facilities "without regard to the provisions of section 321 of the Act of June 30, 1932." Also, Section 2(b) permitted the President to assign enlisted men and officers "irrespective" of the provisions of the National Defense Act of June 3, 1916. Under Section 4(a) the Secretary of War was authorized to remove from the classified civil service any employee of the Military Establishment "notwithstanding the provisions of section 6 of the Act of August 24, 1912," and certain other employees could be hired "without regard to the requirements of civil-service laws, rules, or regulations." Further, in Section 1(a) Congress provided that "the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section" by the Secretary of War, thereby suspending certain statutes which had permitted purchases by means of that system.[20]

The fact that the 1940 Act did not specifically provide for the suspension of such a well known statute as the Fair Labor Standards Act, together

[20] In *Muschany* v. *United States*, 324 U. S. 49, 60-61, this Court indicated that the specific prohibition against the cost-plus-a-percentage-of-cost system in the Act of July 2, 1940, limited the scope of the Act of July 2, 1917, 40 Stat. 241, 518, insofar as the latter statute authorized the use of that system in the purchase of land, because the 1917 Act was in direct conflict with the 1940 Act.

with the express suspension of other statutes, clearly indicates that the suspension of the Act was not intended. This conclusion is reinforced by the legislative consideration of the 1940 Act. A major portion of the report which the House Committee on Military Affairs submitted with the bill consisted of a listing and explanation of the statutes which would be suspended by the new Act. H. Rept. 2261, 76th Cong., 3d Sess. (1940). Likewise, Representative Andrews, a member of the committee, enumerated on the House floor the measures to be suspended. 86 Cong. Rec. 6826. In neither case was the Fair Labor Standards Act mentioned. It must be presumed that if the committee had intended such an important and familiar statute to be suspended, some mention of it, along with the other statutes proposed for suspension, would have been made at some time in the course of the legislative discussion.

It is too well settled to require argument that repeal or suspension of a statute by implication is not favored. Since the 1940 Act contained no express repealing clause, it is not to be construed as repealing a prior law unless the two are so clearly repugnant that no other conclusion can reasonably be drawn.[21] There is no "irreconcilable conflict"

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[21] *Posadas* v. *National City Bank*, 296 U. S. 497; *West India Oil Co.* v. *Domenech*, 311 U. S. 20; *United States* v. *Borden Co.*, 308 U. S. 188; *United States* v. *Jackson*, 302 U. S. 628; *United States* v. *Burroughs*, 289 U. S. 159; *General Motors Corp.* v. *United States*, 286 U. S. 49; *Indiana Mfg. Co.* v.

between the Fair Labor Standards Act and the July 2, 1940, Act; indeed, as a mere reading of the latter statute indicates, there is no conflict whatever. Nor can it be said that "the later act covers the whole subject of the earlier one and is clearly intended as a substitute" (*Posadas* v. *National City Bank*, 296 U. S. at 503). The later act, in this case the Act of 1940, is restricted to War Department procurement of military supplies in the national emergency, enacted under the war power of the Congress, whereas the earlier act, in this case the Fair Labor Standards Act, is broader legislation of general and permanent application in the field of labor relations enacted under the interstate commerce power of the Congress.

As noted above (pp. 33-51), the Government agencies that were directly concerned with the operation of the July 2, 1940, Act, during the years

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Kochne, 188 U. S. 681; *United States* v. *Hommer*, 241 U. S. 379; *United States* v. *Noce*, 268 U. S. 613; *Cope* v. *Cope*, 137 U. S. 682; *Wilmot* v. *Mudge*, 103 U. S. 217; *Red Rock* v. *Henry*, 106 U. S. 596. The rule was stated as follows in the *Posadas* case (296 U. S. at 503): "The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. ***But, in either case, the intention of the legislature to repeal must be clear and manifest.***" [Emphasis supplied.]

of active warfare, proceeded on the assumption that it did not suspend the Fair Labor Standards Act. Thus, as pointed out above (p. 41), the Secretary of War in September 1941 expressed the opinion that employees working at Army ordnance plants operated by cost-plus contractors (such as the plants operated by respondents in the instant cases) were covered by the Fair Labor Standards Act. In his letter to the Comptroller General, dated August 25, 1942, the Secretary of War, referring to this opinion stated that "It seems to be generally conceded by the Ordnance Department * * * that the Act is applicable." 22 Comp. Gen. 277, 278. He inquired whether "the Ordnance Department [was] right in considering the Fair Labor Standards Act applicable to cost-plus-a-fixed-fee contractors engaged in operation of other Ordnance phases of cost-plus-a-fixed-fee contracts" and whether reimbursement would be allowed to the contractor for accrued overtime paid pursuant to the Act. (*id.* at 279).[22] The Comptroller General responded that his office would approve reimbursement by the War Department of overtime payments made by cost-plus contractors pursuant to the Fair Labor Standards Act (*id.* at 281). To the same effect, see 23 Comp. Gen. 439, 444. This approval was apparently given on the assumption

[22] The pertinent portions of the Secretary of War's letter are printed in the Opinion of the Comptroller General, 22 Comp. Gen. Dec. 277, 278.

that only the statutes specifically suspended by the 1940 Act should be regarded as superseded. Previously, the Comptroller General, in considering the suspension by the July 2, 1940, Act of certain statutory limitations on public expenditures, had concluded that "it cannot be said that in the enactment of Public, No. 703 [the July 2, 1940, Act], the Congress suspended, either expressly or impliedly, any existing statutory limitations on the expenditure of public moneys *except those limitations expressly mentioned therein.*" (21 Comp. Gen. 273, 279; emphasis supplied.) This position, we submit, is the only reasonable construction of the terms of the Act of 1940, and as shown below, the legislative history confirms its soundness.

C. The proviso concerning the Walsh-Healey Act carries no implication of intent to suspend the Fair Labor Standards Act.

Respondents here, like defendant in the *Silas Mason* case, place heavy reliance on the clause in Sections 1(a) and 5 of the 1940 Act, specifically preserving the applicability of the Walsh-Healey Act. They infer that the omission of a similar provision with respect to the Fair Labor Standards Act indicates an intent to exclude the application of the latter act. The legislative history of that clause, however, plainly and completely refutes any such inference. On the contrary, the continued application of the Fair Labor Standards Act was explicitly assumed by Senator Wagner, who introduced the Walsh-Healey proviso. Since the 1940

Act would not conflict in any way with the operation of the Fair Labor Standards Act, there was no need to provide specifically for the continued operation of the latter Act. On the other hand, the 1940 Act by permitting negotiated contracts would have taken certain previously covered Government contracts outside the terms of the Walsh-Healey Act unless specific provision was made for their continued coverage by that Act. The legislative history reveals that the Walsh-Healey provisos were added solely in order to prevent such possible curtailment of the application of that Act ("simply to remove the ambiguity"). Senator Wagner [23] explained its purpose as follows:

> A question has arisen—*and the amendment is simply to remove the ambiguity*—as to whether the Walsh-Healey Act, which is now definitely applicable to a contract for the purchase of supplies as a result of advertising, will also apply to a negotiated contract. * * * Unless this amendment is adopted we would have this anomalous situation: Under a contract entered into with the Government as the result of public bidding one set of minimum wages,

[23] The Wagner Amendment, as introduced and passed by the Senate (86 Cong. Rec. 7839-43, 7924), was slightly modified in conference. H. Rept. 2685, 76th Cong., 3d sess. (1940). The original Wagner Amendment provided that "contracts entered into pursuant to the provisions of this section shall not be deemed to be contracts for the purchase of such materials, supplies, articles, or equipment as may usually be bought in the open market within the meaning of section 9", of the Walsh-Healey Act. 86 Cong. Rec. 7924.

> that is, the prevailing wages [under the Walsh-Healey Act], would be applied, whereas under another contract entered into as a result of negotiations, *a much lower minimum wage would be paid, that is, the flat minimum under the Wage and Hour Act* [the Fair Labor Standards Act]. This situation would present an opportunity for exploitation, since a contractor under a negotiated contract might be paying wages in some instances 25 percent or 75 percent below those required under the Healey-Walsh Act. I am sure that we would not want to invite any such exploitation. [86 Cong. Rec. 7924; italics supplied.]

Senator Wagner's explanation thus plainly refutes appellant's interpretation of the reference in the July 2, 1940, Act to the Walsh-Healey Act. The 1940 Act suspended certain statutes requiring advertising for Government contracts, and inasmuch as the Walsh-Healey Act contains an exemption for certain purchases made without advertising,[24] Senator Wagner feared that negotiated contracts made under the 1940 Act would be outside the scope of the former Act. He indicated that it was the purpose of his amendment to make clear that such contracts would remain within the scope of the Walsh-Healey Act. His amendment was *not* of-

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[24] Section 9 of the Walsh-Healey Act provides an exemption for purchases of supplies "as may usually be bought in the open market" (i.e., purchases made without advertising for bids). Section 11 only provides for application of the Act to "contracts entered into pursuant to invitations for bids."

fered with the intent of suspending, with respect to employees of cost-plus contractors, the minimum wage and overtime provisions of all statutes other than the Walsh-Healey Act. On the contrary, his statement reveals specifically that he regarded such employees as covered by the Fair Labor Standards Act. This view was in accord with the general objective, expressed in messages of the President and throughout the legislative debates, to preserve, not curtail, existing legislation for the benefit of labor.

D. Legislative background of July 2, 1940, Act plainly reveals the objective was to preserve, not to curtail, existing legislation beneficial to labor.

The circumstances surrounding the enactment of the July 2, 1940, Act clearly indicate that it was not intended to curtail in any way the application of any existing legislation enacted for the benefit of labor. The bill was introduced in Congress to carry out the President's plea for a tremendous increase in the nation's capacity to produce military equipment and supplies. H. Rept. 2261, 76th Cong., 3d sess. (1940), p. 1. In the President's National Defense Address of May 26, 1940, given over a nation-wide radio hook-up, he stated that in carrying out the defense program, "We are calling upon the resources, the efficiency, and the ingenuity of American manufacturers of war matériel of all kinds—airplanes, tanks, guns, ships, and the hundreds of products that go into this matériel." He indicated that "the Government of the United States stands

ready to advance the necessary money to help provide for the enlargement of factories, the establishment of new plants, the employment of thousands of necessary workers." In the same address, however, he cautioned that in the Nation's rearmament program, it must protect its labor standards. See *supra*, p. 33. He stated specifically that: "There is nothing in our present emergency to justify making the workers of our Nation toil for longer hours than now limited by statute. * * * There is nothing in our present emergency to justify a lowering of the standards of employment. Minimum wages should not be reduced." 86 Cong. Rec. App. 3243, 3244.

From the President's message, therefore, there is strong affirmative evidence of an intent, in executing the national defense measures, to preserve, and not to curtail in any degree, the gains secured by labor under existing social legislation. As the President's message indicates, it was the intent to preserve not only the minimum wage and overtime benefits of existing social legislation, but also to maintain old-age pensions, unemployment insurance and collective bargaining. Certainly respondants would not claim that "the complete system of labor relations," which it is asserted was prescribed by the July 2, 1940, Act, included a system of collective bargaining, social security and unemployment insurance superseding existing law. This Court has held the National Labor Relations Act applicable to war contractors. *National Labor*

Relations v. *Atkins & Co.*, 331 U. S. 398, rehearing denied, 331 U. S. 868; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, rehearing denied, 331 U.S. 868; see also *Wilson & Co.* v. *National Labor Relations Board*, 162 F. 2d 310 (C. A. 8); *Newport News S. and Dry Dock Co.* v. *National Labor Relations Board*, 101 F. 2d 841 (C. A. 4); *United States* v. *Carbide & Carbon Chemicals Corp.*, 21 L. R. R. M. 2525 (E. D. Tenn., 1948).

Indeed, the legislative history of the July 2, 1940 Act shows a clear desire on the part of Congress not only to preserve, but even to extend, the overtime benefits of labor legislation to employees producing military equipment under the provisions of that Act. Thus, as explained above, the Wagner amendment was enacted as a precaution against a possible limitation on the scope of the Walsh-Healey Act. Further, in Section 4(b) of the 1940 Act Congress extended overtime benefits to employees of the War Department who would otherwise not be entitled to overtime compensation. 86 Cong. Rec. 7925, 8902.

The manner in which the Act of July 1940 was applied from the start confirms the conclusion that no special or exceptional treatment of any war contracts was contemplated so far as labor standards were concerned. In short, the whole background and surrounding circumstances belie the suggestion that such a far-reaching exception from the labor policy was contemplated, or would have been

adopted so quietly and unobtrusively as to have been overlooked by everyone and completely ignored throughout the war years, when it would have had most practical significance.[25] How far-reaching an exception the exclusion from the Act of war production contracts would have been is indicated by the high proportion of the Nation's employees who worked under such contracts.[26] As noted above (p. 6, fn. 2), approximately 211 billions of dollars in war contracts were awarded during the war period, over 58 billions of which were in cost-plus contracts. Thus, the exclusion of war contracts from the Act would have been tantamount to a blanket suspension of the Act—a move which was unqualifiedly opposed by all the responsible administrative officials in the Government and which Congress after extensive hearings and consideration deliberately refrained from taking.

There thus appears no tenable basis for the contention that the 1940 Act suspended, by implication, the operation of the Fair Labor Standards Act.

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[25] See "Labor Policies of the National Defense Advisory Commission of the Office of Production Management" (May 1940 to April 1942) (Historical Reports of War Administration: War Production Board, Special Study No. 23). This study reveals that the war agency most concerned with labor policies under war production contracts had not the slightest indication that any such exception was contemplated.

[26] Out of a total of 17,600,000 employees engaged in manufacturing at the peak of the war production program, 10,200,000, or almost sixty per cent, were engaged in war work. "Manpower Statistics," No. 13, page 1 (December 1944), issued by the War Manpower Commission.

II

The Fair Labor Standards Act and the Walsh-Healey Public Contracts Act Are Not Mutually Exclusive

The Eighth Circuit's decision that contractors subject to the Walsh-Healey Act are exempt from the Fair Labor Standards Act is even more novel, and of more serious consequence to the administration of the Fair Labor Standards Act, than any of the other defenses advanced by respondents. For this ruling applies not only to cost-plus war contractors, but apparently to all peace-time contractors with the Government as well. Not only is there no such exclusion in the terms of either statute, but this ruling is contrary to the clear legislative intent and to the consistent construction of these statutes throughout the more than ten years of their existence, not only by the Administrator, but by the courts, and indeed by all governmental agencies concerned.[27] This is illustrated by the explicit notice to all employees in the *Powell* case that they would be paid in accordance with the Fair Labor Standards Act and the Walsh-Healey Act. (See *supra*, p. 12, and *Powell* opinion, 174 F. 2d 718 at 722.)[28]

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[27] The absence of other litigation on this point indicates that this has been the general understanding of employers as well.

[28] The Eighth Circuit itself pointed out in its opinion in *Powell* that "These plaintiffs, as well as all other employees of defendant, were notified in a booklet given them at the commencement of their employment that overtime would be compensated for at the rate provided under the Walsh-Healey Act and the Fair Labor Standards Act." 174 F. 2d at 721-722.

The Walsh-Healey Act, enacted in June 1936, applies only to Government contracts "for the purchase of supplies" in any amount exceeding $10,000. Contractors from whom such supplies are purchased by the Government must agree to pay their employees engaged "in the manufacture or furnishing" of such goods "not less than the minimum wages as determined by the Secretary of Labor to be the *prevailing* minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries *currently* operating *in the locality* in which * * * the supplies * * * are to be manufactured or furnished under said contract" (Section 1(b); italics supplied). The contractors must also agree that such employees shall not be permitted to work "in excess of eight hours in any one day or in excess of forty hours in any one week" (Section 1(c)). However, the Secretary of Labor is authorized under specified circumstances to "modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor" where found "necessary and proper in the public interest or to prevent injustice and undue hardship" and to allow "reasonable variations, tolerances, and exemptions" from the minimum rates and maximum hours (Section 6).

This Act, which preceded the Fair Labor Standards Act by two years, was passed in the session of Congress following the demise of the National In-

dustrial Recovery Act.[29] 80 Cong.Rec. 10537-38, 74th Cong., 2d sess. This was at the time when the idea of regulating wages and hours had just suffered severe reverses and when it seemed that any comprehensive regulation of wages and hours could not meet Constitutional tests. The scope of the Act therefore was not only confined within comparatively narrow limits, but also the standards prescribed were flexible with considerable latitude allowed for modifying, relaxing or suspending them. While remedies by way of administrative hearings and by withholding funds or by court action to collect liquidated damages for violation (Sections 2, 4 and 5) were provided, there was no provision for criminal sanction or the injunction remedy or the employees' right to sue for double damages, such as were provided in the subsequent Fair Labor Standards Act.

In the Fair Labor Standards Act, enacted in June 1938, Congress undertook, in the exercise of its broad "power to regulate commerce," to establish nation-wide and comprehensive *minimum* labor standards "necessary for health, efficiency and general well-being of workers" (Section 2). In contrast to the variable "prevailing" wage standard of the Walsh-Healey Act and the broad authority for administrative relaxation of standards, Congress

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[29]Act of June 16, 1933, c. 90, 48 Stat. 195. See Senate Report No. 1157 on S. 3055 (Public Contracts bill), 74th Cong., 1st sess.; *Schechter Corp.* v. *United States*, 295 U. S. 495, decided May 27, 1935.

in the Fair Labor Standards Act prescribed the rudimentary "*minimum*" standards which were made applicable broadly to all employees "engaged in [interstate] commerce or in the production of goods for commerce," and which could not be administratively relaxed or suspended, except pursuant to specific exemptions. The terms "commerce," "employer," "employee," "employ," "produced," and "goods" were all defined in broadest terms to insure as comprehensive coverage as practicable.[30] Correspondingly, the exemptions were delineated in such detail as to negate unexpressed or implied exemptions. In particular, since Congress was very explicit when it wished to exclude employees because they were regulated by other possibly overlapping Federal statutes (see Section 13(a)(4) exempting employees subject to regulation under the Railway Labor Act, and Section 13(b)(1) and (2) exempting employees subject to regulation by the Interstate Commerce Commission), or because they were Government employees (see Section 3(d)), the absence of an express exemption for employees subject to the Walsh-Healey Act indicates clearly that no such exemption was intended.

Affirmative and conclusive evidence that employees subject to other Federal or State statutes are not excluded from the Fair Labor Standards Act (except where expressly exempted) is found in

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[30] See Section 3 on definitions.

Section 18 of the Act. Section 18 provides that nothing in the Act "shall excuse noncompliance with any Federal or State law or municipal ordinance establishing * * * a higher standard than the standard established under this Act;" this would clearly seem to cover the Walsh-Healey Act.

The statutory language and purposes, as well as the ten years of experience in administering the statutes, completely refute the view of the court below that "the two Acts are sufficiently divergent that both may not apply at one and the same time." (174 F. 2d at 725.) While, as the Eighth Circuit pointed out in its opinion (p. 725), both Acts to some extent had as a purpose "the improvement of living conditions and labor standards," neither Act "covers the whole ground occupied by" the other or was "clearly intended as a substitute" for the other. See *Red Rock* v. *Henry*, 106 U. S. 596, 601-602; *Posadas* v. *National City Bank*, 296 U. S. 497, 504. Contrary to the assumptions by the court below, the Walsh-Healey Act does not so thoroughly cover the subject of wages and hours and labor standards for workers employed under Government contracts as to make "unnecessary" or superfluous the application of the lower minimum standards of the Fair Labor Standards Act. The very differences in the standards and the purposes of the two Acts demonstrate that there is sound reason for their concurrent application and that such was the Congressional intent.

The court below itself recognized that the Walsh-Healey Act, unlike the Fair Labor Standards Act, provided "no minimum wage fixed at a figure comparatively low if compared with wages actually being paid in manufacturing industries" (*Powell* opinion, R. 993-994). The standard under the Walsh-Healey Act was the "prevailing" standard which ordinarily, as the court observed, "was more favorable to labor than the later Fair Labor Standards Act" (*ibid.*). This was in accord with the purpose of that Act to prevent the Government's "vast orders for supplies and construction" from being utilized as an instrument to break down prevailing labor standards. The objective was essentially a negative one—to prevent the Government's purchases from causing existing standards in any locality to deteriorate—rather than an affirmative measure to establish and regulate minimum labor standards generally. Accordingly, this Act was concerned with higher standards than the rock-bottom, rudimentary standards, and for this reason a wider latitude for relaxation and variation was allowed and less stringent enforcement measures were provided.

In contrast, the Fair Labor Standards Act prescribed the *minimum* standards which, because they were rudimentary and the minimum deemed necessary for health and decent living, were to be uniform nationwide standards, "of which we may properly ask general and widespread observance" (See Message from President of the United

States on wages and hours, H. Doc. 255, 75th Cong., 1st sess., p. 3). As the President's Message stated, in the Fair Labor Standards Act the purpose was to prescribe a "few rudimentary standards," the failure to observe which "must be regarded as * * * unwarranted under almost any circumstance" (*ibid.*).

Thus, while there might be a leeway for relaxation and waiver of the higher "prevailing" standards, the subsequent statute set the barrier below which the standards and the sanctions could not be relaxed in the absence of express exemption. In this way the statutes can operate consistently, and without repugnance, at one and the same time. The suggestion by the court below that the simultaneous operation of both Acts would cause "confusion in computing wages and the collection of claims therefor" (174 F. 2d at 725) is simply not borne out by the more than ten years of experience during which both Acts have been simultaneously enforced without difficulty or confusion.[31]

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[31] Indeed, untold confusion would attend adoption of the Eighth Circuit's mutually exclusive construction. Under the present method of administration the standards prescribed in the Fair Labor Standards Act are applied with continuity, with adjustments for employees affected when the employer makes a contract with the Government. The employee knows that he is continuously entitled to the minimum benefits of the Fair Labor Standards Act and that he has his remedies under that Act. If the statutes were mutually exclusive there would be constant vacillation respecting the application of the minimum standards and the remedies of the employees, and, as pointed out, *infra*, pp. 83-84, many employees might find

The coverage of the Fair Labor Standards Act and the Walsh-Healey Act may overlap in some instances, but there is nothing inconsistent in the application of both statutes, where both are applicable by their terms. There is nothing in either statute "which provides for exclusiveness of remedy" or "for an election of remedies." Cf. *Brooks v. United States*, 337 U. S. 49, 53. On the contrary, "the language, framework and legislative history" (*ibid.*, at p. 54) require the conclusion that the acts were not intended to be mutually exclusive but rather mutually reenforcing.

The fact that the two acts would overlap in certain circumstances was appreciated from the outset. Prior to the enactment of the Fair Labor Standards Act, the Secretary of Labor drew the attention of Congress to the fact that the bill (Fair Labor Standards) "overlaps to some extent the administrative functions performed with respect to Government contracts under the Walsh-Healey Act" (81 Cong. Rec. Appendix 1484, 75th Cong., 1st sess., June 15, 1937). The Secretary recommended that the Walsh-Healey Act nevertheless "should be continued in full force and effect" for the reason, but obviously only for the reason, of taking advantage of the Walsh-Healey Act to the extent that it covered certain businesses which it was thought could not

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themselves in a "no-man's-land" outside the protection of either statute whenever they were assigned to work under a Government contract.

constitutionally be regulated under the commerce power (e. g., it might be applied to "certain distributive concerns engaged in intrastate business"), and to the extent that its labor standards might in some cases be higher (*ibid.*).

There was no suggestion that the retention of the Walsh-Healey Act would operate to exclude employees working under Government contract from the broader coverage and the basic minimum standards or from the more effective remedies provided in the Fair Labor Standards Act. No evidence of any such Congressional intent appears in the legislative history. On the contrary, Section 18 appears to have been incorporated in the Act to insure against any such result. Where an employee comes within the scope of both Acts, there is nothing inconsistent in the application of both. In *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, 948 (C. A. 6), where similar contention was made concerning the Fair Labor Standards Act and the Eight Hour Law,[32] which is also applicable to employees working on Government contracts, the court stated, "No difficulty will be perceived in complying with both statutes." This is equally true of the Fair Labor Standards Act and the Walsh-Healey Act. As to employees entitled to the benefits of one of the Acts but not the other, the employer should have no difficulty in observing the requirements of the applicable one.

[32] 54 Stat. 884, 40 U. S. C. 325a.

As to employees coming within the protection of both Acts, observance of the highest minimum wage, overtime and child labor standards provided in either Act automatically satisfies the requirements of the other Act. In this way the different standards provided in the two Acts may be reconciled. As noted above (pp. 38-40), the Army's Manual of Instructions recognized that compliance with both Acts was required and also was entirely feasible, describing in detail how to determine the applicable standards when there appeared to be an "overlap." There is no area of repugnance between them where compliance with one necessarily results in violation of the other.

While, as noted in the Eighth Circuit's opinion, the Walsh-Healey Act provides other sanctions, and in some respects is more favorable to labor than the minimum standards of the Fair Labor Standards Act, the Walsh-Healey standards and sanctions are by no means substitutes for the more definite and unalterable standards or for the criminal sanction and the employee remedy of the Fair Labor Standards Act. As pointed out earlier, the Fair Labor Standards Act fixes definite minimum standards which cannot be relaxed or waived administratively as can the Walsh-Healey standards. Similarly, the direct employee remedy and the criminal sanction of the Fair Labor Standards Act afford greater assurance of enforcement than the more cumbersome administrative enforcement procedure of the Walsh-Healey Act. As this

Court has pointed out, one of the important features of the Section 16(b) remedy is that it has the "virtue of minimizing the cost of enforcement by the Government. It is both a common-sense and economical method of regulation" which "puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act." *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 at 706, n. 16.[33]

Even in the event that there is adequate administrative machinery for prompt action by the Administrator, the instant cases illustrate that the

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[33] There is clearly no merit in the argument made by the contractors in the court below that the liquidated damages provision of the Fair Labor Standards Act supports the conclusion that the statutes are mutually exclusive since Congress should not be presumed to have intended to impose a "penalty" against the Government. This argument overlooks the fact that the Walsh-Healey Act also applies to lump-sum contractors, who receive no reimbursement for wages or liquidated damages, and thus could not cause the imposition of any such "penalty" against the Government if the Fair Labor Standards Act applied. Furthermore, the assumption that liquidated damages assessed under Section 16(b) constitute a penalty is a misconception of their nature. As this Court stated in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583, such damages "are compensation, not a penalty or punishment by the Government." Accordingly, the Government, in reimbursing a cost-plus contractor for liquidated damages under Section 16(b) is not assessing a penalty against itself. In any event, the Portal-to-Portal Act of 1947 provides ample protection against any possible inequitable imposition of liquidated damages in cases like the instant ones. (See Sections 9 and 11.)

employee may be confronted with further obstacles and problems apparently overlooked by the Eighth Circuit. For example, the Walsh-Healey Act has never been interpreted or administered to extend its benefits to employees engaged only in processes and occupations "necessary to" the manufacture or production, as distinguished from employees engaged directly in productive processes, whereas, the Fair Labor Standards Act, by its terms and as construed by the courts, applied broadly to employees "employed in producing, manufacture, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State" (Section 3(j)).[34] Thus, the decision below might have the anomalous result of excluding altogether from the Federal labor standards employees who would clearly be within the scope of the Fair Labor Standards Act if they were not engaged in work on Government contracts (see petitioners' briefs in *Powell*).

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[34] Section 3(j) was amended by the Act of October 26, 1949 (c. 736, Public 393, 81st Cong., 1st sess.) to read as follows: "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." This amendment, which becomes effective on January 25, 1949, has no significance with respect to the instant cases.

Such a result would be in direct conflict with the letter and purpose of Section 18 of the Fair Labor Standards Act.

Since the original enactment of the Fair Labor Standards Act, Congress has frequently recognized that both Acts were applicable to Government cost-plus contracts. Each annual report since 1942 had expressly brought to the attention of the Congress the Administrator's view that most employers subject to the Public Contracts Act are also subject to the Fair Labor Standards Act as well,[35] and detailed schedules of the Administrator's inspection activities showing the enforcement of that view.[36] Further, the Administrator and the Secretary of Labor, in testifying before Congressional appropriation committees with respect to the annual appropriations for the Wage and Hour and Public Contracts Divisions, have repeatedly informed the committees that the two Acts are being enforced and administered on the assumption that they overlap.[37] The Administra-

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[35] 1943 Annual Report, p. 9; 1944 Annual Report, p. 10; 1945 Annual Report, p. 2; 1946 Annual Report, p. 14; 1948 Annual Report, p. 5.

[36] 1943 Annual Report, p. 2; 1944 Annual Report, p. 37; 1945 Annual Report, p. 17; 1946 Annual Report, pp. 18, 20; 1947 Annual Report, p. 69; 1948 Annual Report, p. 31.

[37] Hearings before Subcommittee of the House Committee on Appropriations for the 1944 Labor Department Appropriation (78th Cong., 1st sess.) pp. 105, 144; Hearings before Subcommittee of the Senate Committee on Appropriations for

tor's annual reports also show that in a number of cases administrative proceedings under the Walsh-Healey Act have been accompanied by criminal prosecutions under Section 16(a) of the Fair Labor Standards Act.[38] On the basis of these reports and testimony, Congress each year has voted appropriations for such enforcement without the slightest hint of criticism that the money was being expended in enforcement activities not contemplated in the basic statutes. In analogous situations such "repeated appropriations" have been held to constitute Congressional "confirmation and ratification" of an administrative interpretation of long-standing and consistent application. *Brooks* v. *Dewar,* 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.,* 331 U. S. 111, 116; see also *Wells* v. *Nickles,* 104 U. S. 444, 447; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147; *Alaska Steamship Co.* v. *United States,* 290 U. S. 256.

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the 1944 Labor Department Appropriation (78th Cong., 1st sess.) pp. 28, 33; Hearings before the Subcommittee of the House Committee on Appropriations for the 1945 Labor Department Appropriation (78th Cong., 2d sess.), pp. 404, 413, 432-433, 435; Hearings before Subcommittee of the House Committee on Appropriations for 1946 Labor Department Appropriation (79th Cong., 1st sess.) pp. 195, 223, 235.

[38] See Administrator's Annual Report for 1948, p. 9. The records of the United States District Courts show at least 20 criminal cases in which defendants have been convicted and fined for violations under the Fair Labor Standards Act where those same defendants were found liable in administrative proceedings under the Walsh-Healey Act.

Finally, the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C., Supp. II, 251) also shows that Congress believed that the Fair Labor Standards Act applied to Government contractors. One of the stated purposes of the Portal Act was to invalidate portal-to-portal claims by employees under the Fair Labor Standards Act because of the "increased cost of war contracts" by virtue of liabilities to cost-plus contractors from such claims. (Section 1, "Findings and Policy"). This statement would have been meaningless if all Government contractors were exempt from the Act, as appears to follow from the decision of the Eighth Circuit in these cases.

As already noted it has been the consistent administrative construction of these statutes throughout the more than ten years of their existence, by the Department of Justice and by the Wage and Hour Administrator, that both statutes may apply to employees of Government contractors. Before and throughout the War, the Secretary of War was apparently of the same opinion (see *supra*, pp. 38-41). And it is to be observed that in the *Silas Mason* case the Department of the Army did not suggest even the possibility of a defense based upon the Walsh-Healey Act. See also opinion of the Comptroller General dated September 28, 1942, 22 Comp. Gen. Dec. 277. We think it plain that everyone concerned has assumed correctly for years that both statutes apply to employees of government contractors, and that

the contrary decision of the court below is as wrong as it is novel.

III

Petitioners Were Employees of Respondents, Not of the United States

Section 3(d) defines the term "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State * * *." Respondent in the *Powell* case conceded that it was the employer of petitioners, but respondent in the *Aaron* case contended that it was acting as the "agent of the Government" in the employment of petitioners and was therefore exempt from the Fair Labor Standards Act under Section 3(d). The Court of Appeals for the Eighth Circuit, in concluding that the Walsh-Healey Act was applicable in both the *Powell* and *Aaron* cases, necessarily held that the contractors and not the Government were the employers, since the Walsh-Healey Act does not apply to employees of the United States but only to those "employed by the contractor" (41 U. S. C. 35). Although respondent in the *Creel* case also conceded that the petitioners were its employees (R. 16, 251, 252, 266, 268, 279), nevertheless, the Court of Appeals for the Fifth Circuit held that respondent was simply the agent of the United States, and that therefore petitioners were

employees of the United States within the exclusion of Section 3(d) of the Act (R. 236).

The Fifth Circuit decision not only rests upon erroneous assumptions regarding the terms of the contract between the Government and respondent, but disregards the clear understanding between the contractor and the Government contracting agency and ignores entirely the relationship between the contractor and petitioners. The ruling is contrary to the express terms of the contract, to the consistent previously expressed view of the Secretary of War, and to the official position insisted upon by the Ordnance Department in its instructions relating to the administration of such contracts. It is also directly opposed to the representations made to the employees by the contractors and by the public pronouncements and conduct of the responsible Government officials.

It is settled under this Court's decisions that service performed by a private corporation "under a contract with the United States does not make it an instrumentality of the latter," ever though the service is performed on Government-owned property and under "supervisory" control by the Government. See *Buckstaff Co.* v. *McKinley*, 308 U. S. 358, 360-363 (holding the exemption in the Social Security Act for services performed "in the employ of the United States Government or of an instrumentality of the United States" inapplicable to employees of an Arkansas corporation organized for profit whose only business was the

operation of a bath house on the United States Government Reservation known as Hot Springs National Park). Although the Government contracting agency (Department of Interior) reserved control over such details as "the number of bath tubs which may be used, the charges to the public, the qualifications of employees, the maintenance and care of the premises, a prohibition of employment of agents to solicit patronage, and control over an assignment or transfer of the lease or any interest therein" (*id.* at 360), the Court held "That control, being wholly supervisory is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality." *Id.* at 363. More recently, in *United States* v. *Silk*, 331 U.S. 704, 712, the Court stated that "Obviously the private contractor who undertakes to build at fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees." See also *Alabama* v. *King & Boozer*, 314 U. S. 1; *Curry* v. *United States*, 314 U. S. 14; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514.

It may be noted that the language of the comparable exemption of the "United States" in Section 3(d) of the Fair Labor Standards Act is not as broad as the Social Security Act provision, in that Section 3(d) does not contain the

additional language "or of an instrumentality of the United States." It seems clear therefore that Congress in excluding "the United States" from the definition of "employer" did not intend any broader exemption than would be included under the term "instrumentality" of the United States.[39]

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[39] There is nothing in the debates or reports in the legislative history on the Section 3(d) exclusion; such an exemption for the United States is a common one in statutes of general application, and Section 3(d) apparently was not intended to have any effect different from such exemption in other statutes. The only evidence in the legislative history bearing on the meaning of Section 3(d) supports the conclusion that the exemption was not intended to apply to *contractors* with the Government. During the course of the Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200 (75th Cong., 1st sess.) the following exchange took place between Representative Smith and the then Attorney General [now Mr. Justice] Jackson (p. 82):

> Representative Smith. Does the bill apply to municipally hired employees?
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> Mr. Jackson. I think not. There is a specific exemption, page 3, section 6, that an employer shall not include the United States or any State or political subdivision thereof.
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> . . . . . .
>
> Representative Smith. Is there anything to cover employees working under contracts for municipalities?
>
> Mr. Jackson. You mean where the contract is let and the contractor employs the help?
>
> Representative Smith. The contractor takes a contract of a town or a city or a State.
>
> Mr. Jackson. The question whether his help would be included?
>
> Representative Smith. Yes.

The controlling decisions of this Court make it clear that the determination of the question whether the contractor under such Government contracts is acting as an agent or instrumentality of the United States "turns on the terms of the contract and the rights and obligations of the parties under it" (*Alabama* v. *King & Boozer*, 314 U. S. 1 at 9), and upon "the actual conduct of the parties" under the agreement (*Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, 795). In particular, in determining whether the contractor or the United States is the employer under such a contract, "No single phrase can be said to determine the employer." *Ibid.* Thus, the fact that the contracts in the instant cases were made pursuant to the authorization in the July 1940 Act for the construction and operation of facilities "through the agency" of private manufacturers "under contracts entered into with them" (on which phrase some of respondents have placed great emphasis),[40] is no more decisive than are "such words as employer, agent, independent con-

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Mr. Jackson. I don't see any reason why his help would be exempted.

The Chairman. If they were engaged in interstate commerce?

Mr. Jackson. Yes, if they were engaged in interstate commerce.

[40] But see *Alabama* v. *King & Boozer*, *supra*, which also involved a contract made pursuant to this provision of the July 1940 Act.

tractor" in the contract terminology. "One must look at the venture as a whole" (337 U. S. at 795), including dealings between the contractor and the employees on the one hand as well as those between the contractor and the United States on the other. *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 255; *Cosmopolitan Shipping Co.* v. *McAllister*, *supra*, at 790. When all of these factors are considered, we believe the contention that the contractor in the instant cases was simply the agent of the United States in the employment of petitioners is clearly contrary to the above controlling decisions.

A. Contract terms and relationship between the contractor and the Government.

As pointed out in the Statement (*supra*, p. 10), each contract specifically provided that the contractor would hire the employees and that they "shall be subject to the control and constitute employees of the contractor." The contract in the *Powell* case, in addition, explicitly stated that "The Government desires to have the Contractor, as an independent contractor on a cost-plus-a-fixed-fee basis, make all necessary preparations for the operation of said plant, including the training of operating personnel [other than exceptions not relevant here] * * * and operate said plant." (R. 764). The contract further provided "It is expressly understood and agreed by the Contractor and the Government that in the performance of

the work provided for in this contract, the Contractor is an independent contractor and in no wise an agent of the Government" (R. 780).

The statement in the opinion of the court of appeals in the *Creel* case that the contract "provided that appellee was operating the plant as a Government agency" (R. 236) is incorrect. The contract contains no such provision. While the contracts in the *Creel* and *Aaron* cases did not include the additional above quoted provisions of the *Powell* contract, they did specifically provide that the contractor should be responsible for "the employment of all persons engaged in the work hereunder (who shall be subject to the control and constitute employees of the Contractor)" *Aaron*, 2 R. 41; *Creel*, R. 300, 351-352. The contracts in all three cases, also, referred throughout and repeatedly to "employees of the contractor," and "persons employed by the contractor" (e. g., see *Powell* R. 771, 772, 773, 783, 811; *Creel*, R. 293, 294, 298, 300, 302, 305, 351-352; *Aaron*, 2 R. 34, 36, 41, 42, 46, 49, 50). All three contracts specifically provided that the contractor was to "design, construct and equip * * * and *operate*" the plant (italics supplied; *Creel*, R. 288; *Aaron*, 2 R. 24; *Powell*, R. 764; see also *Powell*, R. 766; *Aaron*, 2 R. 40; *Creel*, R. 299, 373, 384, 387). And in all three cases, the contractor agreed to "do all things necessary or convenient in and about the operating and closing down of the Plant, or any part thereof, including (but not limited to) the employment

of all persons engaged in the work hereunder (*who shall be subject to the control and constitute employees of the Contractor*)" (*Powell*, R. 770-771; *Aaron*, 2 R. 41; *Creel*, R. 300, 351-352; emphasis supplied).

Each contract made clear the fact that the contractor had possession of the plant for the purpose of operating it. Provision was made that the contracting officer was to be afforded "access to the premises" (*Powell*, R. 788; *Aaron*, 2 R. 64; *Creel*, R. 320), and if the contract were terminated as the result of the contractor's fault, the contracting officer had authority to "enter upon the premises and take possession" (*Powell*, R. 781; *Aaron*, 2 R. 59; *Creel*, R. 316), thereby indicating that possession of the plant was otherwise in the contractor. Supplemental contracts specifically stated, "It is recognized that property (including without limitation machine tools and processing equipment, manufacturing aids, raw, manufactured scrap and waste materials) title of which is or may be hereafter become vested in the Government, * * * will be in the care, custody, or possession of the Contractor in connection with his performance of this contract" (*Powell*, R. 833, 834; *Creel*, R. 343, 352).

Numerous other provisions of the contracts were wholly inconsistent with the theory that the contractor was the Government's agent. Thus the contracts recognized that employees of the contractor might be engaged both in work under the Govern-

ment contract and in other work for the contractor not related to the Government contract (*Powell*, R. 772-775, 791; *Creel*, R. 305-307, 335, 357; *Aaron*, 2 R. 46-47, 49). If the contractor failed to meet his payroll promptly the Government was authorized under the contract to meet the payroll and to deduct a penalty from the contractor's fee. In addition, the contract provided for the applicability of the Walsh-Healey Act (*Powell*, R. 783, 825; *Aaron* 2 R. 43; *Creel*, R. 301-302, 331), the Eight Hour Law of June 19, 1912 (40 U. S. C. 324) (*Aaron*, 2 R. 36, 39; *Creel*, R. 297), State workmen's compensation insurance laws (*Powell*, R. 790; *Aaron*, 2 R. 66; *Creel*, R. 322), and the Social Security Act (*Powell*, R. 773; *Creel*, R. 306), none of which are applicable to Government employees. Furthermore, the contract prescribed fines and penalties payable to the Government for violations of the Eight Hour Law (*Aaron*, 2 R. 36, 39; *Creel*, R. 297) and Walsh-Healey Act (*Powell*, R. 784; *Aaron*, 2 R. 44; *Creel*, R. 303), provisions inconsistent with the theory that respondent was the Government's agent and not a private contractor. *United States* v. *Driscoll*, 96 U. S. 421, 423-424. Other stipulations in the contract inconsistent with such a theory are the provisions (*Powell*, R. 827; *Creel*, R. 334, 360), for scaling down excessive profits as required by Section 403 of the Sixth Supplemental National Defense Act of 1942 (the Government pays no profits to its agencies), the provision that wage costs higher than those authorized by the

Government would be borne by the respondent (*Powell*, R. 774; *Aaron*, 2 R. 48; *Creel*, R. 306, 356), and the representation by each respondent that it was "a manufacturer of or a regular dealer in the materials * * * to be manufactured * * * in the performance of the contract" (*Powell*, R. 783; *Aaron*, 2 R. 43; *Creel*, R. 302).

All of these facts show that the explicit pronouncement in the contracts that the persons employed shall "constitute employees of the Contractor" was an accurate description of the actual employment relationship.

While it is recognized that the contract terminology in and of itself is not necessarily decisive (*Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *Bartels* v. *Birmingham*, 332 U.S. 126; *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 at 795), there is no indication in the records in these cases that these contract provisions did not accurately describe the actual employment relationship and "the actual conduct of the parties" (*Cosmopolitan* opinion, *ibid.*). The "Manual of Instructions for the Administration of Contracts" (Appendix B, *infra*, pp. 157-171), which was in effect during most, if not all, of the period of these contracts, emphatically and repeatedly instructed the Government contracting officer that "the contractor is an independent contractor, not an agent or employee of the Government" (Section I(G)(3)); that "the contractor must furnish and supervise

all labor required for the performance of the work and the employees thus furnished are those of the contractor and in no sense those of the Government" (Section X(A)(1)); that "the contractor is responsible for the hiring, firing, and working conditions of employees on the project, and, subject to the approval of the contracting officer, the determination of their wages and hours" (Section I(G)(3)); that the Government contracting officer or other representatives of the War Department "will not participate in the arbitration, conciliation or mediation of existing or threatened labor disputes or any negotiations in connection therewith" and "shall exercise the utmost care to carry out the intent of this principle" (Section X(B)(2)); that the responsibility for compliance with the various Federal labor laws "is entirely the contractor's" and that while the contracting officer "may be consulted from time to time as to the details of such compliance * * * he has absolutely no responsibility in connection with the contractor's compliance therewith," that this responsibility "is solely the Contractor's and the Contracting Officer's Representative's function in this connection is merely advisory" (Section XI (A)).[41]

In the dealings between the contractor and the Ordnance Department in each of the instant cases, both parties treated the petitioners as employees

[41] These provisions are quoted in full in Appendix A, *infra*, pp. 157-171. To the same effect, see the Ordnance Procurement Instructions, Appendix D, *infra*, pp. 176-178, 180-182.

of the contractor within the meaning of the Fair Labor Standards Act. The "Manual of Instructions for the Administration of Contracts" pointed out that "The Ordnance Department's Cost-plus-a-fixed-fee contracts and the various Federal Labor Laws make it abundantly clear that the responsibility for compliance with the provisions of such laws is entirely the Contractor's" (Section XI(A)). Moreover, the Manual explained that "The Fair Labor Standards Act (Wage-Hours Law) must * * * be considered applicable to Ordnance C.P.F.F. Contracts. * * * The interpretation of this definition [of "commerce" and "produced" in the Act] is, at the present time, so broad as to include virtually all employees of Cost-plus-a-fixed-fee Contractors except those specifically exempted by the terms of the statute." (Sections XI(G)(1), XI(I)(1)). The Procurement Regulations provided that overtime payments made "in accordance with the [Fair Labor Standards] Act are reimbursable to cost-plus-a-fixed-fee contractors as labor costs" (PR 9, par. 934; 10 CFR (1945) Sec. 809.934).

In each of the instant cases, the contractor's personnel records specifically indicated whether each employee was regarded as exempt or nonexempt under the Act (*Powell*, R. 321-325, 327, 940-941, 943; *Aaron*, 1 R. 46, 49; *Creel*, R. 270, 273-275). The wages paid to the employees depended in part upon their exempt or nonexempt classification, and in order to secure reimbursement for such wages, the contractor submitted

these personnel records to Ordnance Department representatives for approval (*Powell*, R. 937-941, 943, 951; *Aaron*, 2 R. 14, 143-144; *Creel*, R. 83, 267-268, 323-324).

B. Relations between the contractor and the employees.

As shown above, the dealings between the contractor and the Ordnance Department in each of the instant cases all point to the fact that the employees were employees of the contractor and not of the United States. The relations between the contractor and the employees—a second element to be considered under this Court's opinions in the *Silas Mason* and *McAllister* cases— confirm and support this conclusion. The *Powell* record presents a complete picture of this relationship. The evidence clearly shows that in actual practice the contractor hired, promoted and discharged the employees, that it solely directed and controlled their work, and that it handled all labor relations with the employees. Ordnance Department officials, on the other hand, exercised no direct or personal supervision over the employees' work.

In the *Powell* and *Aaron* cases, the contractor handed each new employee a manual explaining his employment status (*Powell* R. 40, 50, 63-64; *Aaron*, 1 R. 44, 53, 2 R. 128). The *Aaron* manual was not introduced into evidence, but the complete *Powell* manual is reprinted in the record (R. 189-213). This manual informed the employee that he was an employee of the contractor (R. 189,

191-192, 194, 196, 198, 200), and that "The Company * * * is responsible to the United States Government for ammunition production * * * and to our employees, for the establishment of working conditions" (R. 191). The company's employment department "has the final authority to hire" (R. 202). The employee was informed that the company "pays you your wages but is immediately repaid by the United States Government" (R. 204). Deductions were to be made from the employee's wages for workmen's compensation, unemployment compensation and social security, and the contractor would contribute an equal amount as its share (R. 190, 202, 207, 209, 210). The manual stated that "it is the policy of the Company to promote from within the organization" (R. 209). It was indicated that the company's department of industrial relations handled the employee's grievances (R. 195) and supervised any necessary disciplining of employees (R. 201).

The *Powell* record reveals that in actual practice the contractor did the hiring, promoting, discharging and paying of employees (R. 190, 202, 207, 209, 210, 940). Further, it clearly shows that the contractor minutely supervised petitioners' duties. The manuals issued by the contractor to petitioners described in great detail their duties and how they were to be performed (R. 69-109, 217-283, 466-583). Likewise, in the *Aaron* and *Creel* cases, the employees were hired, paid and discharged by the contractor and not by the Govern-

ment (*Aaron*, 1 R. 43, 46, 2 R. 17; *Creel*, R. 85, 259, 269). They worked exclusively under the supervision and direction of the contractor's personnel (*Aaron*, 1 R. 45-49), and their activities were governed by the latter's rules, regulations and bulletins (*Aaron*, 1 R. 45-49; *Creel*, R. 268). At no time did Ordnance Department personnel attempt to supervise the employee's work (*Aaron*, 1 R. 48-51). The records in the *Aaron* and *Powell* cases show that the notices of employment, time cards, applications for pay during absences, payrolls and other records pertaining to petitioners' employment were issued under the contractor's name (*Powell*, R. 321-327, 589, 597, 601, 611, 623, 625; *Aaron*, 2 R. 155-161).

Further evidence in the instant cases that petitioners were employees of the contractor rather than of the United States is apparent from the clear distinction drawn between "employees of the contractor" and "Government personnel." The July 1940 Act, by its terms, of course, draws this distinction (Section 4(b)). In addition, the Ordnance Department, in its supervision of the contractor's operation of the plant and of its expenditures, employed a number of civilians at each plant (*Powell*, R. 349, 353, 359, 635, 815; *Aaron*, 1 R. 62, 2 R. 9, 12; *Creel*, R. 266). At the *Powell* plant, there were about 2,000 such employees (R. 635) and at the *Aaron* and *Creel* plants there was "a large number" (*Aaron*, 2 R. 12; *Creel*, R. 266). This Government personnel was paid di-

rectly by the Ordnance Department (*Aaron*, 2 R. 74), but petitioners received their pay from the contractor and were on the contractor's payroll (*Powell*, R. 206, 940; *Aaron*, 2 R. 73, 146; *Creel*, R. 309). The Ordnance employees were under the supervision of Ordnance's contracting officer or his representatives at the plant (see "Manual of Instructions for Administration of Contracts, Section II(D); Ordnance Procurement Instructions, par. 50,002.12; 2 War Labor Service par. 25,203), whereas the contractor's employees, as indicated *supra* (pp. 101-102), worked exclusively under the direction and control of the contractor and received no supervision from Ordnance officials. An incident which occurred in the *Powell* case aptly illustrates the distinction which the Government and the contractor maintained between the two groups of employees. When the Ordnance Department dissolved its shipping department at the plant and the functions of that department were taken over by the contractor's shipping department, the Ordnance Department employees remaining at the plant were transferred to the contractor's payroll as its employees and no longer retained their civil service status (R. 353-354, 359, 362).

C. The controlling court decisions.

Concededly, the cost-plus contracts in these cases reserved to the Government a considerable degree of supervisory control. This was necessary not only because of the Government's financial respon-

sibility to reimburse for all expenses but also because of the dangers inherent in handling munitions and high explosives. But this supervisory control was precisely of the same nature as the control exercised under the contracts involved in *Alabama* v. *King & Boozer*, 314 U.S. 1, and *Buckstaff* v. *McKinley*, 308 U. S. 358, and "neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government" to hire employees and prescribe their working conditions (cf. *Alabama* v. *King & Boozer*, *supra* at 13). On the contrary, as aptly stated by dissenting Judge Hutcheson in the *Creel* case, "The whole elaborate system was designed and operated so that the United States should *not* be the employer" (Italics supplied).

That the contractors in the instant cases were not agents or instrumentalities of the United States in the employment of petitioners is graphically and conclusively demonstrated by comparing the basic factual considerations in the instant cases with the facts in *Alabama* v. *King* & *Boozer* and *Curry* v. *United States*, on the one hand, and with those in *Cosmopolitan Shipping Co.* v. *McAllister* on the other. The marked similarity of the instant cases to the *King* & *Boozer* and *Curry* cases is paralleled by the equally marked contrast between these cases and *Cosmopolitan Shipping Co.* v. *McAllister*.

1. *Alabama* v. *King & Boozer conclusively establishes that respondents were not Government agents or instrumentalities in the employment of petitioners.*

Although the *King & Boozer* case dealt with a somewhat different problem (the taxability by a State of purchases of material by a cost-plus contractor), the legal issue there, as here, was whether the contractors were acting as agents of the United States, rather than as independent contractors, with respect to the functions in question. The conclusion in the *Curry* case that the contractors "were not agents or instrumentalities of the Government" (314 U.S. 14, 17-18) in making the purchases would seem *a fortiori* to require the conclusion that the contractors in the instant cases were not acting simply as agents of the United States in the employment of petitioners. As noted more fully below (pp. 110-112), the Secretary of War and the Ordnance Department, and the Seventh Circuit in *Bell* v. *Porter*, 159 F. 2d 117, certiorari denied, 330 U.S. 813, were of the opinion that the *King & Boozer* decision established that the United States was not the employer under such contracts within the meaning of Section 3(d) of the Fair Labor Standards Act.

In the *King & Boozer* and *Curry* cases, the Government retained an even greater degree of control over the purchases of materials than was reserved in the instant cases over the employment qualifications and work of employees. The contract in the *King & Boozer* and *Curry* cases (for the construction of an Army camp and other military facilities on a military reservation of the United States), like the contracts here, was a cost-plus-a-fixed-fee con-

tract, made pursuant to the Act of July 2, 1940. As pointed out in the Government's brief in the *King & Boozer* case (p. 83), the contract there expressly provided that the performance of the contract was "subject in every detail to [the] supervision, direction, and instructions" of the contracting officer (*King & Boozer* record, p. 50)—a blanket provision not included in the contracts in the instant cases. Particularly with regard to the furnishing and purchase of materials and supplies, the Government retained complete and detailed control. Under that contract, as under the contracts in the instant cases, the Government reserved "the right to furnish any and all materials * * * necessary" for the completion of the work, with the contractor authorized to provide the materials, supplies, etc. "not furnished by the Government" (314 U.S. at 10; cf. *Powell*, R. 768, 771; *Creel*, R. 299-300; *Aaron*, 2 R. 41). As under the contracts in the instant cases, "the title to all work completed or in the course of construction or manufacture" was vested in the Government, and title to all purchased materials, tools, equipment, etc. passed to the Government "upon delivery at the site of the work or at an approved storage site" (cf. *King & Boozer* R. 51 with *Powell* R. 786; *Aaron*, 2 R. 63; *Creel*, R. 390).[42]

[42] In the King & Boozer contract, as here, it was provided that such vesting of title "shall not operate to relieve the Contractor from any duties imposed" upon it by the contract (cf. *King & Boozer* R. 51 with *Powell* R. 786, and *Aaron*, 2 R. 63).

In addition to furnishing the contractor with detailed specifications, and requiring that extensive books and records be kept and always be open to Government inspection, the Government reserved the right "to pay directly to the persons concerned all sums due from the contractor for labor, materials or other charges" (314 U.S. at 10; cf. *Powell* R. 775 with *King & Boozer* R. 56). One of the "special requirements" in the *King & Boozer* contract stipulated that the contractors should reduce to writing every contract in excess of $2,000, made by him for services, materials and supplies and insert a provision therein that the contract was assignable to the Government (314 U.S. at 11). Significantly a comparable provision in the contracts in the instant cases excepted "contracts for employment" from this requirement, thus indicating the greater degree of independence allowed the contractors in the instant cases in employment matters (*Powell*, R. 787; *Creel*, R. 321; *Aaron*, 2R. 65). Moreover, while in the instant contracts, as in *King & Boozer*, the Government reserved the right to require the contractor to dismiss from the work any employee the contracting officer deems "incompetent or to be not in the public interest," the right in the instant cases was further "subject, however, to appeal" by the contractor (cf. *Powell*, R. 782; *Creel*, R. 321; *Aaron*, 2 R. 65 with *King & Boozer*, R. 60).[43] If the United States itself were the em-

[43] The right of dismissal reserved in the *King & Boozer* contract was considerably broader, providing that the contracting

ployer, the contractor would have no interest in appealing from a discharge by the Government of one of its own employees. In addition, the contract in *King & Boozer*, "reserves to Government officers the decision of whether to buy and what to buy; that purchases of materials of $500 or over could be made by the contractors only when approved in advance by the contracting officer; that the Government reserved the right to approve the price, to furnish the materials itself, if it so elected; and that in the case of the lumber presently involved, the Government inspected and approved the lumber before shipment" (314 U.S. at 13).

The contractor in *King & Boozer* was required to submit to the contracting officer, in advance, a proposal in writing of the supplies to be purchased, specifying the prices and the description, and to secure approval of the contracting officer before placing the order (314 U.S. at 11). Just as in the instant cases, the job classification and wage rates schedule had to be approved by the Government contracting officer, so in the *King & Boozer* case

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officer might require dismissal of any employee he deemed "incompetent, careless, insubordinate, or otherwise objectionable" (*King & Boozer*, R. 60). Cf. quotation in text of corresponding provision in *Powell* record.

The Contracting Officer's right to require the Contractor to dismiss employees deemed incompetent or whose retention was not deemed in the public interest does not make the Government the employer, as *National Labor Relations Board* v. *Atkins & Co.*, 331 U.S. 398, 407, which involved much stronger provisions for governmental control, attests.

the contractor was required to submit to the contracting officer charts of his personnel showing "the duties and rates of pay of each person" and the procedure proposed to be followed by the contractor for the accomplishment of the work (cf. Government's brief amicus in *King & Boozer* case, p. 83, with *Powell*, R. 792; *Creel*, R. 324; *Aaron*, 2 R. 69). Similarly, in the *King & Boozer* cases, as in the instant cases, the qualifications of certain types of employees had to be approved in advance by the contracting officer (cf. *King & Boozer*, R. 53 with *Powell*, R. 791, 938; *Creel*, R. 83; *Aaron*, 1 R. 55). As in the instant cases, the contract in *King & Boozer* contained detailed provision for full Government control over the amount of every expenditure. The contractor was to be reimbursed for no item until approval of the invoice by the contracting officer (see Government's brief in *King & Boozer*, p. 88). And, as in the instant cases, shipments were made to the construction quartermaster at the site "for account of" the contractors (314 U.S. at 11). The invoice was approved by the construction quartermaster before payment was made by the contractor and the Government later reimbursed the contractor (*id.* at 12).

In short, every element of control relied upon by any of the respondents as evidencing a mere agency agreement was also present in the contract in the *King & Boozer* and *Curry* cases, and indeed the extent of control reserved by the Government in the *King & Boozer* situation was even greater. Despite

this extensive control "in every detail" over the purchases, the contractor was held not to have the status of agent of the Government since the contract contemplated that they should "obligate themselves for the purchase of material ordered" and not "bind the Government to pay for" it (314 U.S. at 13). The fact that the Government owned the plant under construction in its entirety and acquired title to the purchased materials immediately upon their delivery, as well as the fact that the Government was obliged to reimburse the contractors for all such expenditures, was held insufficient to constitute the contractor the agent of the Government.

In view of the remarkable parallel between the facts and the issues in the *King & Boozer* case and in these cases under the Fair Labor Standards Act, it is not surprising that the Seventh Circuit in *Bell v. Porter* considered the citation of the *King & Boozer* and *Curry* decisions "enough to say that cost-plus-a-fixed-fee contractors with the Government, engaged in war production, are not agents of the Government and do not share the Government's sovereign immunities." 159 F.2d 117 at 118; see also in accord on the employment issue: *Walling v. Patton-Tulley Transp. Co.*, 134 F.2d 945, 949 (C.A. 6); *Walling v. McCrady Construction Co.*, 156 F.2d 932, 934 (C.A. 3); *Kelly v. Bord, Bacon & Davis*, 162 F.2d 555, 557, n. 4 (C.A. 3); *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F.2d 334 (C.A. 9); *Divins v. Hazeltine Electronics*

Corp., 163 F.2d 100 (C.A. 2). Cf. *National Labor Relations Board* v. *Carroll*, 120 F.2d 457 (C.A. 1). *Contra*: *Selby* v. *J. A. Jones Construction Company*, 175 F.2d. 143 (C.A. 6).

Nor is it surprising to find that the Secretary of War and the Ordnance Department also expressed the same opinion and considered the *King & Boozer* decision decisive of the employment question under Section 3(d) of the Fair Labor Standards Act. In a letter dated August 25, 1942, the Secretary of War wrote to the Comptroller General in part as follows (22 Comp.Gen.Dec. 277, 278):

> The Ordnance Department is aware, of course, of the fact that the United States is not an *employer* as that term is defined in Section 3(d) of the Fair Labor Standards Act, and is, therefore, specifically excluded from its requirements. See also 20 Comp.Gen. 24. This exclusion would not, however, cover Ordnance cost-plus-a-fixed-fee contractors as operating employers since such Ordnance Contractors have been designated in Title VIII, Article VIII-A-6 of the instant contract, and generally in other Ordnance contracts, to be independent contractors. The Supreme Court, in the case of *Alabama* v. *King & Boozer, et al*, decided November 10, 1941, 314 U.S. , and the Comptroller General in his decisions B-19726, B-19652, 21 Comp. Gen. 682, and B-23012, dated February 9, 1942, expressed the same opinion. As independent contractors, they would be employers, as that term is defined in the Fair Labor Standards Act, and, if engaged in

interstate commerce, as they appear to be, then their employees are entitled to the overtime provided for in the Act.

Indeed, the most forceful argument made in support of the agency contention in the *King & Boozer* case—i.e., that the financial and economic burden must be borne by the Government—is even less persuasive in the instant cases. For, whatever intent may be attributed to the Government to avoid State taxation, there can be no doubt whatsoever of the Government's understanding and indeed deliberate policy to accept the financial burden that might be occasioned by the contractor's compliance with the Fair Labor Standards Act. The legislative and administrative background reviewed in the introduction to the Argument (see particularly pp. 44-51) conclusively refutes any suggestion that Congress intended to avoid this financial burden. As pointed out in the above discussion (pp. 46-47), Congress was fully aware of the financial burden and deliberately rejected proposals to avoid it.[*]

[*] Contrary to the contention made by respondent in the *Aaron* case in the court below (brief for appellee, p. 37), the decision in *United States* v. *Allegheny County*, 322 U.S. 174, did not recede from the views expressed in the *King & Boozer* case, at least insofar as the employment and agency issues are concerned. While holding that a State tax could not be imposed directly upon Government-owned property in the hands of a contractor-bailee, the Court was careful to differentiate the *King & Boozer* case (see 322 U.S. at 177, n. 2, 186 n. 7).

So generally accepted was the opinion that the Act applied to employees of Government contractors that employees working under contracts similar to those in the instant cases were held entitled to recover wages in numerous employee suits under the Act (a number of which reached this Court) without the employment question ever being raised. *Bay Ridge Operating Co.* v. *Aaron*, 334 U. S. 446; *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377; see also *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Skidmore* v. *Swift & Co.*, 323 U.S. 134.[45]

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[45] For similar cases in the courts of appeals holding or assuming the Act to be applicable, see: *Walling* v. *Haile Gold Mines*, 136 F.2d 102 (C.A. 4); *Fox* v. *Summit King Mines*, 143 F.2d 926 (C.A. 9); *Landreth* v. *Ford, Bacon & Davis*, 147 F.2d 446 (C.A. 8); *Bell* v. *Porter*, 159 F.2d 117 (C.A. 7), certiorari denied, 330 U.S. 813; *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F.2d 334 (C.A. 9); *Lewis* v. *Florida Power & Light Co.*, 154 F.2d 751 (C.A. 5); *Divins* v. *Hazeltine Electronics Corp.*, 163 F.2d 100 (C.A. 2); *Laudadio* v. *White Construction Co.*, 163 F.2d 383 (C.A. 2); *Bennett* v. *V. P. Loftis Co.*, 167 F.2d 286 (C.A. 4); *Day and Zimmermann* v. *Reid*, 168 F.2d 356 (C.A. 8); *Joshua Hendy Corp.* v. *Mills*, 169 F.2d 898 (C.A. 9); *Walling* v. *McCrady Construction Co.*, 156 F.2d 932 (C.A. 3), certiorari denied, 329 U.S. 785; *Clyde* v. *Broderick*, 144 F.2d 348 (C.A. 10); *Basik* v. *General Motors Corp.*, 311 Mich. 705; *Katchel* v. *Northern Engraving and Manufacturing Co.*, 249 Wis. 578; *George Lawley & Son Corp.* v. *South*, 140 F.2d 439 (C.A. 1), certiorari denied, 322 U.S. 746; *Frank* v. *Wilson & Co.*, 172 F.2nd 712 (C.A. 7), certiorari denied, 337 U.S. 918.

2. *Cosmopolitan Shipping Co.* v. *McAllister*, 337 *U.S.* 783 *shows that the relationships are quite different when Government employment is contemplated.*

In contrast to the instant cases where "the whole elaborate system was designed and operated so that the United States should not be the employer" (see *supra*, p. 104), the whole system of the standard form agency agreement in the *Cosmopolitan* case was designed and operated so that the United States would be the employer. The status of the "general agent" who was held in that case not to be the employer, and the relationships between the various parties concerned, differed in virtually every basic respect from the status of the contractors and the relationships in the instant cases. In the first place, contrary to the terms of the contracts in the instant cases (under which the contractor was "an independent contractor and in no-wise an agent of the Government"), the contract between the "general agent" and the United States in the *Cosmopolitan* case expressly designated the general agent "as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it" (337 U.S. at 795). Secondly, "neither the possession nor management of the vessel" was conferred on the agent (*id.* at 798). Whereas in the instant cases the contractors had possession of the plants and full responsibility for their management and operation, the general

agent in the *Cosmopolitan* case had "no part in the actual management * * * of the vessel" (*id.* at 796), his duties being limited to the shoreside business of the Government-owned vessel.

Even more importantly, in contrast to the broad responsibility "for the hiring, firing, and working conditions of employees" placed upon the contractors in the instant cases, the general agent in the *Cosmopolitan* case had no such authority and responsibility with respect to the crew of the vessel. These employees "were to be hired by the master of the ship and were to be subject to his orders only" (*id.* at 799) and the master of the ship was expressly "designated by the contract as an agent and employee of the United States" (*id.* at 785). Under the terms of the agreement in the *Cosmopolitan* case, "The responsibility of employing the officers, so the Regulations show, was vested exclusively in the master, and the men so hired became employees of the United States and not of the general agent" (*id.* at 799). The shipping articles signed by the employees upon employment in the *Cosmopolitan* case were stamped at the top with the statement "You Are Being Employed By the United States" (*id.* at 785-786)—exactly the reverse of the representation made to employees in the instant cases. In the actual dealings with the employees in the *Cosmopolitan* case, the master and not the general agent hired them, supervised their work and paid their wages, whereas these functions

were all performed by the contractors in the instant cases.

3. United States v. *United Mine Workers*, 330 *U. S. 258, involved a wholly different issue. To the extent applicable, it supports the position here advanced by the Government.*

The case of *United States* v. *United Mine Workers*, which respondent in the *Aaron* case has asserted "is so clearly in point" (see brief *amici* filed by Owens, McHaney & Lofton in *Silas Mason* case, Supreme Court, October Term 1947, p. 9), dealt with an entirely different issue, since it involved Government operation of the mines in substitution for the private employers and in accordance with the terms of a labor agreement between the Government itself and the union. To the extent that the opinion can have any application to the instant cases, it appears clearly to confirm the conclusion that the contractor rather than the Government, had the requisite possession and control of the plant and its operation characteristic of the employer. The factors which the majority opinion in the *United Mine Workers* case emphasized as indicative of an employment relationship were that the Government had "seized actual possession of the mines" and was "operating them" (330 U.S. at 289) and had entered into direct negotiations and agreement over the terms and conditions of employment, which agreement "was one solely between the Government and the union" to which the private operators were not parties (*id.* at 286-287). The ownership of the facilities and the ultimate

financial responsibility were held to "have little persuasive weight in determining the nature of the relation existing between the Government and the mine workers" (*id.* at 288). In the instant cases the Government is more in the position of the mine owners in that it owns the facilities and has the ultimate financial responsibility, but it has not seized and it is not in possession of and is not operating the facilities, and has not assumed any of the attributes or functions of an employer which it had assumed over the coal mines.

IV

The Munitions Were Produced for "Commerce" Within The Meaning of the Fair Labor Standards Act

Respondents concede that almost all of the munitions produced by petitioners in the instant cases were shipped out of the State. Nevertheless, the contention is made that such munitions were not produced for "commerce," and the Fifth Circuit so held in the *Creel* case (R. 241).[46] The Court of Appeals for the Eighth Circuit in the *Aaron* and

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[46] See also *Kennedy* v. *Silas Mason Co.*, 164 F.2d 1016; *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F.2d 1012, and *Reed* v. *Murphey*, 168 F.2d 257. Compare, however, the latest "cost-plus" decision of the Fifth Circuit, *McDonald* v. *Kershaw, Butler, Engineers, Ltd.*, 172 F.2d 798, where the court refused to rule on the merits but remanded the cause "for retrial and resubmission." Upon remand, the district court entered a compromise judgment on behalf of plaintiffs for claimed unpaid compensation but not for liquidated damages (Decree of the District Court for the Northern District of Alabama, Southern Division, dated October 5, 1949, in Civil Action No. 6057).

Powell opinions did not rule on the "commerce" question.

"Commerce" is defined in the Fair Labor Standards Act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Section 3(h). This definition on its face is as broad as the constitutional phrase. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 128; *McLeod* v. *Threlkeld*, 319 U.S. 491, 493-494. Since the munitions in the instant cases were produced for "transportation" from the State where they were produced to a "place outside thereof," they were produced for "commerce" within the literal terms of the statutory definition.

The only reason suggested by respondents or by the Fifth Circuit for the contrary view is that the munitions "were not manufactured for sale, nor were they ever intended or used for commercial purposes" (164 F.2d at 1017). But this Court has established in numerous decisions that the movement of goods or persons across State lines is "commerce," even though no sale or commercial transaction or purpose is involved. *United States* v. *Hill*, 248 U.S. 420, 423-424 (transportation of whiskey for personal consumption); *Edwards* v. *California*, 314 U. S. 160, 172 (exclusion of paupers); *Thornton* v. *United States*, 271 U.S. 414, 425 (unrestrained ranging of cattle); *Caminetti* v. *United States*, 242 U.S. 470 (transportation of a woman for an immoral purpose but not for com-

mercial vice); *Gooch* v. *United States*, 297 U.S. 124 (transportation of a kidnapped person); *Brooks* v. *United States*, 267 U.S. 432 (transportation of a stolen automobile). See also *United States* v. *Darby*, 312 U.S. 100, 113, where the Fair Labor Standards Act was upheld as a regulation of commerce on the authority of several of the "non-commercial" cases. And see *United States* v. *Southern-Eastern Underwriters Assn.*, 322 U.S. 533, 549), where this Court, after reviewing the above line of decisions, concluded, "Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic. * * * ."

It has thus long been settled that "commerce" as used in the Constitution includes "the transportation of persons and property no less than the purchase, sale and exchange of commodities" (*United States* v. *Hill*, 248 U.S. 420, at 423), and that "It is immaterial whether or not the transportation is commercial in character" (*Edwards* v. *California*, *supra* at 172, fn. 1). There can be no question, therefore, that interstate commerce includes the interstate transportation of Government-owned goods irrespective of whether such transportation be commercial in the strict business sense.

The issue here is whether Congress intended to create an exception from the "commerce" regulated by the Fair Labor Standards Act for the transportation of Government-owned goods, which literally come within the statutory definition. This question, in view of the exemption in Section 3(d)

for the Government as an employer, arises only with respect to the employees of private employers producing materials for the Government. Clearly, no such limitation appears in the broad statutory definition of "commerce," which includes the language of the Constitution. Nor is there anything in the legislative history of the Act which indicates a Congressional intent to narrow the definition so as to except the transportation of Government-owned goods produced by private employers. On the contrary, this Court has recognized that it was clearly the purpose of the Act to extend its control "throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567.[47] "Nowhere in the Act is it suggested that Congress intended that transportation effected by the Government or of Government goods be treated differently from all other transportation." *Bell* v. *Porter*, 159 F.2d 117, 119 (C.A. 7), certiorari denied, 330 U.S. 813.[48] This Court, speaking of an-

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[47] Citing the following statement by Senator Borah: "• • • if the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of carrying on that business are within the terms of this bill, and, in my opinion, are under the Constitution of the United States." 83 Cong. Rec., 75th Cong., 2d sess., part 8, p. 9170.

[48] See also *Clyde* v. *Broderick*, 144 F.2d 348, 351 (C.A. 10); *Ware* v. *Goodyear Engineering Co.*, 6 W. H. Cases 160 (S.D. Ind., 1946); *Umthun* v. *Day & Zimmerman, Inc.*, 235 Iowa 293, 16 N.W. 2d 258; *Timberlake* v. *Day & Zimmerman, Inc.*, 49 F.Supp. 28 (S.D.Iowa).

other statute, made the following comment, which is equally applicable here: "The statute makes no distinction between different modes of transportation and we think it was intended to include them all, that being the natural import of its words." *United States* v. *Simpson*, 252 U.S. 465, 466-467. See also *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U.S. 453, 463.

There would thus appear to be no valid reason or authority for confining the scope of this Act to transportation for "commercial" purposes. Nor is the fact that the transportation is for war purposes a valid basis for divergence from the established concept of "commerce." Certainly transportation by rail of Government-owned war materials is interstate commerce for purposes of the Interstate Commerce Act. Cf. *United States* v. *Powell*, 330 U.S. 238; *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248. The powers granted to Congress under the Constitution are not mutually exclusive. Thus, the Government has in the past acted simultaneously under the "war" and "commerce" powers (see *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 326-330); as it also frequently proceeds simultaneously under its power over "commerce" and over the mails. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U.S. 1, 11; *Electric Bond & Share Co.* v. *Securities & Exchange Comm.*, 303 U.S. 419, 432-433. The courts have consistently held that contractors carrying mail for the Government in the

exercise of the postal power are within the scope of statutes regulating labor relations and standards under the commerce power. *National Labor Relations Board* v. *Carroll*, 120 F.2d 457 (C.A. 1); *Fleming* v. *Gregory*, 36 F.Supp. 776 (E.D.La.); *Thompson* v. *Daugherty*, 40 F.Supp. 279 (D.Md.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F.Supp. 742 (W.D.Va.). No reason has been advanced for reaching a different result with respect to contracts entered into under the war power.

The contention that transportation of Government-owned materials by the United States or under governmental supervision is a mere administrative act of the Government and therefore not "commerce" is equally untenable; it too apparently derives from the "commercial" misconception of commerce. See *National Labor Relations Board* v. *Idaho-Maryland Mines Corp.*, 98 F. 2d 129 (C.A. 9), holding the National Labor Relations Act inapplicable to the mining and sale of gold, which was produced in California and sold to the United States Mint in that State, and after being commingled with the products of other producers, was transported by the Government to a mint in another State. The court stated that the interstate shipments were made "not as commercial transactions, but as administrative acts of Government." But the court then went on to say, "If, however, such acts may be said to constitute commerce, it is a commerce to which respondent's activities are not closely, intimately or substantially related."

Thus, it is not entirely clear to what extent, if at all, the *Idaho-Maryland* decision actually rested on the proposition that shipment of goods by the Government does not constitute "commerce." Subsequent decisions of the Ninth Circuit, however, make it evident that the *Idaho-Maryland* holding has been limited strictly to the facts of that particular case. Cf. *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. 2d 780 (C.A. 9), certiorari denied, 312 U.S. 678; *Fox* v. *Summit King Mines*, 143 F. 2d 926 (C.A. 9).[49] And in the recent case of *Joshua Hendy Corp.* v. *Mills*, 169 F. 2d 898 (C.A. 9), which involved a factual situation closely resembling the instant one, the Ninth Circuit held that the construction of ships under a cost-plus contract with the Maritime Commission which "were sent by the Maritime Commission to points outside the state of their origin" (*id.* at 901), constituted "production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Many other courts have held factual situations closely resembling the one presented here to be subject to the Fair Labor Standards Act. *Bell* v. *Porter*, *supra*, 159 F. 2d 117 (C.A. 7), certiorari

[49] See also *Canyon Corp.* v. *National Labor Relations Board*, 128 F. 2d 953 (C.A. 8); *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (C.A. 4); *Umthun* v. *Day & Zimmerman*, 235 Iowa 293, 16 N.W. 2d 258; *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28, 33; *National Labor Relations Board* v. *Cleveland Cliffs Iron Co.*, 133 F. 2d 295, 300 (C.A. 6).

denied, 330 U.S. 813; *Ware* v. *Goodyear Engineering Corp.*, 6 W.H. Cases 160 (S.D.Ind.) (not officially reported); *Umthun* v. *Day & Zimmerman*, 235 Iowa 293, 16 N.W. 2d 258; *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28 (S.D.Iowa); *Brown* v. *Consolidated Vultee Aircraft Corp.*, 80 F. Supp. 257 (W.D.Ky.); *Burke* v. *Mesta Mach. Co.*, 79 F. Supp. 588 (W.D.Pa.); *Jackson* v. *Northwest Airlines*, 75 F. Supp. 32 (D.Minn.) (pending on appeal in C.A. 8); *Bailey* v. *Porter*, 83 F. Supp. 988 (N.D.Ill.); *Moehl* v. *E. I. DuPont de Nemours & Co.*, 84 F. Supp. 427 (N.D.Ill.); *Roland* v. *United Airlines*, 75 F. Supp. 25 (N.D.Ill.); *O'Riordan* v. *Helmers, Inc.*, 6 W.H.Cases 961 (N.Y.C.Ct., 1947); *Belanger* v. *Hopeman Bros.*, 6 W.H.Cases 616 (D.Maine, 1947); *McCumsky* v. *Norden, Inc.*, 7 W.H.Cases 142 (N.Y.S.Ct., 1947); *Simkins* v. *Elmhurst Contracting Co.*, 181 Misc. 791, affirmed, 181 Misc. 793, affirmed, 268 App. Div. 858; *Henderson* v. *Bechtel-McCone Corp.*, 7 W.H.Cases 107 (N.D.Ala., 1947).[50] In each of these cases war

[50] See also *Swettman* v. *Remington Rand*, 65 F. Supp. 940 (S. D. Ill); *Bauler* v. *Pressed Steel Co.*, 81 F. Supp. 172 (N. D. Ill.); *Bumpus* v. *Remington Arms Co.*, 77 F. Supp. 94 (W. D. Mo.); *Tiller* v. *Anchor Optical Corp.*, 6 W. H. Cases 655 (S. D. N. Y., 1947). These cases, similar to those listed above, hold that the production of war materials under Government cost-plus contracts constitutes "production of goods for commerce" within the coverage of the Act. It is not clear, however, from the opinions in this group of cases whether the out-of-State transportation was actually conducted by the Government itself. *Contra*: *Selby* v. *J. A. Jones Construction*

materials owned by the Government were processed under a Government cost-plus contract, with the United States taking possession of the finished products at the processing plant and transporting them across State lines. In each case, it was held, contrary to the position advanced by respondents here, that the processing constituted production of goods for commerce within the coverage of the Act.

The unsoundness of the restrictive interpretation of "commerce" is well illustrated by the inconsistencies in the opinions adopting it. Thus, in *Kennedy* v. *Silas Mason Co.*, 164 F. 2d 1016, 1017, the court, in holding that such materials were not produced for "commerce," pointed to the fact that they were not intended "for commercial purposes," and in *Reed* v. *Murphey*, 168 F. 2d 257, 262, the court stated "War is not commerce. There can be no commerce in war equipment." Yet in *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. 2d 1012, 1015, the same court conceded that "There can be commerce in war equipment," and in its *Silas Mason* opinion (164 F. 2d at 1017), it

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Co., 175 F. 2d 143 (C. A. 6); *Ackerman* v. *Republic Aviation Corp.*, 8 W. H. Cases 518 (E. D. N. Y.); *Barksdale* v. *Ford, Bacon & Davis*, 70 F. Supp. 690 (E. D. Ark.); *H. B. Deal & Co.* v. *Leonard*, 196 S. W. 2d 991 (S. Ct. Ark.); *Kruger* v. *Los Angeles S. & D. Corp.*, 6 W. H. Cases 831 (S. D. Calif.); *Stewart* v. *Kaiser Co*, 71 F. Supp. 551 (D. Oregon); *Anderson* v. *Federal Cartridge Corp.*, 72 F. Supp. 644 (D. Minn.); *Lynch* v. *Embry-Riddle Co.*, 63 F. Supp. 992 (S. D. Fla.); *Trefs* v. *Foley Bros.*, 7 Lab. Cas. par. 61,743 (W D. Mo.).

specifically states that a manufacturer, who as an independent contractor "engaged under its contract in the business of manufacturing munitions of war" for sale to the Government, would be covered by the Fair Labor Standards Act. To the same effect, see *Reed* v. *Murphey*, 168 F. 2d at 263. Further, in the *St. Johns River Shipbuildi.* case, 164 F. 2d at 1014, the same court held that the production of Liberty ships under a cost-plus contract with the Government was for "commerce," in spite of the fact that the Government received delivery at the shipyards and itself transported the ships out of the State. It relied on *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100 (C.A. 2) for the proposition that "transportation by the Government of Government owned munitions" is not "commerce" (*Silas Mason*, 164 F. 2d at 1017), although the Second Circuit specifically stated that the transportation of munitions and supplies by the Government during war was "commerce" within the meaning of the Fair Labor Standards Act (163 F. 2d at 102).[51]

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[51] In the *Divins* case, the Second Circuit drew a distinction between aircraft carriers, battleships and submarines, on the one hand, which it regarded as "instrumentalities of war, not of commerce," and armed cargo transports and armed transports, on the other, which it regarded as engaged in commerce, "even though the goods or persons they transport will be devoted to the war effort after arrival at destination." 163 F. 2d at 102. See also *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C. A. 2).

Thus, the Fifth Circuit's opinions indicate that neither the Government ownership nor the war use, standing alone, would suffice to exclude the transportation of munitions from the scope of the statutory definition of "commerce." There would seem no greater reason for concluding that the two factors combined have that effect. The Fifth Circuit, like the Second Circuit in *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100, appears to have been particularly influenced by the view that something produced and transported solely for war (noncommercial) purposes could not be "commerce" in the constitutional or statutory sense. But, as pointed out *supra*, pp. 118-119, this view would appear to be precluded by the long line of decisions of this Court holding that any transportation of goods across State lines is "commerce" whether or not "commercial" in character. We know of no precedents of the Supreme Court to the contrary.

The result reached by the Fifth Circuit appears to have been influenced not by valid legal reasoning, but by the court's belief that the national interest would not be served by holding the Act applicable to employees in munitions factories. (See *Kennedy* v. *Silas Mason Co.*, 164 F. 2d 1016, at 1019; *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. 2d 1012, at 1015; *Reed* v. *Murphey*, 168 F. 2d 257, at 263). This consideration would seem to be more properly addressed to the legislative than to the judicial branch of the Government. Con-

gress was fully advised of the fact that the Fair Labor Standards Act was being applied to employees of contractors engaged on the Government war contracts,[52] and as previously indicated (pp. 49-53), it gave extensive consideration to the question of whether such employees should continue to be covered by the Act. After Congressional committees had been informed by those in charge of the war production program that the suspension of the overtime provisions would hamper, rather than aid, war production, both Houses rejected proposed amendments which would have suspended those provisions. See p. 51, *supra*. This legislative background conclusively shows, first, that Congress regarded the production of munitions for the Government as production "for commerce" within the meaning of the Act, and secondly, that it intended such employees to remain within the coverage of the Act.

As pointed out in the introduction to the Argument, throughout the course of the war, all of the Government agencies concerned proceeded on the assumption that production of munitions and other

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[52] House Hearings before the Committee on Naval Affairs, 77th Cong., 2d sess., on H. R. 6790; Senate Hearings before the Subcommittee of the Committee on Appropriations, 77th Cong., 2d sess., on H. R. 6736, Part II (on "Progress of the War Production Program"); Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1942, pp. 2-3. See also Annual Report of the Administrator of the Wage and Hour Division to Congress for the years ending June 30, 1944, p. 11, and June 30, 1946, pp. 1-2.

goods to be shipped across State lines for use by the Government in the prosecution of the war, was for "commerce" within the scope of the Federal statutes regulating labor standards and relations? As pointed out above, *supra,* p. 37, the Army Ordnance's "Manual of Instructions" specifically stated:

> The Fair Labor Standards Act applies to every employee (except those specifically exempted thereunder) engaged in interstate commerce or in the production of goods for such commerce. Under this statute an employee is deemed engaged in "production" if he is employed in "any process or occupation necessary to the production" of goods. The interpretation of this definition is, at the present time, so broad as to include virtually all employees of Cost-plus-a-fixed-fee Contractors except those specifically exempted by the terms of the statute.

And the Secretary of War in his letter to the Comptroller General of August 25, 1942 (*supra,* pp. 111-112), expressed the opinion that "As independent contractors, they [the cost-plus-a-fixed-fee war production contractors] would be employers, as that term is defined in the Fair Labor Standards Act, and, *if engaged in interstate commerce, as they appear to be,* then their employees are entitled to the overtime provided for in the Act." (Italics supplied.) The Administrator of the Fair

Labor Standards Act[53] and the National Labor Relations Board[54] have both consistently so ruled, and the great weight of judicial authority has supported this position.[55]

Thus, it appears that the position advanced in the instant cases—that the munitions were not produced for "commerce"—rests on a misconception of "commerce" which is contrary to the controlling decisions of this Court as well as the clear terms of the statutory definition, and it is inconsistent with the intent and understanding of Congress and of the agencies directly involved.

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[53] Quoted in 22 Comp. Gen. Dec. 277, 281.

[54] *In re Reynolds Corp.*, 74 N. L. R. B. 1622; *In re Monsanto Chemical Co.*, 76 N. L. R. B. 767; *In re Carbide and Carbon Chemical Corp.*, 73 N. L. R. B. 134; *In re Roane-Anderson Co.*, 71 N. L. R. B. 266; *In re Brown Shipbuilding Co.*, 57 N. L. R. B. 326; *In re Houston Shipbuilding Corp.*, 46 N. L. R. B. 161; *In re Copolymer Corp.*, 52 N. L. R. B. 578; *In re War Hemp Industries*, 57 N. L. R. B. 1709; *In re United States Cartridge Co.* 42 N. L. R. B. 191; *In re Lukas-Harold Corp.*, 44 N. L. R. B. 730; *In re Certain-Teed Products Co.*, 48 N. L. R. B. 43; *In re Sinclair Rubber Inc.*, 57 N. L. R. B. 800; *In re Lone Star Defense Corp.*, 63 N. L. R. B. 579.

[55] *Bell* v. *Porter*, 159 F. 2d 117 (C. A. 7), certiorari denied 330 U. S. 813; *Joshua Hendy Corp.* v. *Mills*, 169 F. 2d 898 (C. A. 9); *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100 (C. A. 2) (as indicated *supra*, p. 126, fn. 51, the Second Circuit, while holding the Act inapplicable to production of warships, specifically stated that transportation of munitions constituted "commerce" within the coverage of the Act); *Umthun* v. *Day & Zimmerman*, 235 Iowa 293, 16 N. W. 2d 258. See also the trial court decisions listed on p. 124, *supra*.

V.

Section 3 (i) Does Not Exclude Respondents From the Scope of the Act.

Section 3(i) of the Fair Labor Standards Act defines "goods" as used in the Act as meaning all commodities, excepting "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." The position has been taken that even if the munitions were produced for "commerce" and the United States is the producer, the Fair Labor Standards Act is nevertheless inapplicable because of the above definition of the term "goods." The Court of Appeals for the Fifth Circuit so held in *Kennedy* v. *Silas Mason Co.*, 164 F. 2d 1016, 1018, and respondents urge this view here.

Plainly, Section 3(i) was not intended to exempt from the Act employees working on the goods during the course of production, manufacture or processing. In the instant cases, the employees of the contractors were not working on the goods after their delivery to the United States *as ultimate consumer* but while the goods were being manufactured or processed. Thus they plainly do not come within the language of the exempting clause, which relates only to "goods after their delivery into the actual physical possession of the ultimate consumer".[56]

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[56] The records in the instant cases do not indicate that the Government, *before* the munitions were produced by petition-

The Fifth Circuit in the *Silas Mason* case apparently was of the view that if the ultimate consumer took delivery within the state in which the goods were manufactured or produced, the subsequent interstate transportation by the consumer could not be taken into account in determining whether the goods were produced for commerce. Such a construction has the effect of extending the exemption to the producer and manufacturer. The result would be that if an ultimate consumer takes delivery within the state, the producer's operations are exempt, but if the consumer takes delivery after interstate transportation the producer's operations would be covered—although in each instance it was known that the goods were destined for interstate shipment. Furthermore, since the exempting clause itself excludes the ultimate consumer who is also a "producer, manufacturer or processor," the result of the construction adopted by the Fifth Circuit and urged by respondents here

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ers, had physical possession, as distinguished from title, of any of the materials. But, assuming that some of the raw materials may have previously been in the hands of the United States, the "goods" which petitioners were producing, the munitions, were not delivered into the "actual physical possession" of the United States until *after* petitioners had produced them. In any event it seems clear that the delivery referred to in Section 3 (i) is delivery to the ultimate consumer for use in consumption and not for further processing, so that it is immaterial whether the raw materials had previously been in the "actual physical possession" of the Government.

would be to bring within the Act the manufacturing operations of an ultimate consumer who himself carries the goods across state lines, but to exempt the same operations if carried on by an independent manufacturer who is not himself the consumer but who sells to the ultimate consumer within the state for interstate shipment.

It is only necessary to give Section 3(i) a literal sensible reading to avoid these anomalous and capricious results. Such an interpretation of the exempting clause as not affecting the status of the goods while they are being produced (whether by the consumer or before delivery to him) is in accord not only with the terms of the statute, but with its purpose and history. Furthermore it has been the interpretation consistently adopted by the Government—Wage and Hour Administrator[37]

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[37] Administrator, Wage and Hour Division, Department of Labor, Interpretative Bulletin, No. 5 (Revision of November 1939), par. 6, 1940 Wage and Hour Manual 131, 133. This paragraph was readopted without change in the July 1947 revision of the Administrative Interpretations. See 29 C. F. R. Part 776.7(h), 12 Fed. Reg. 4583, 4585. The paragraph reads in part as follows:

"The fact that products lose their character as 'goods' when they come into the actual physical possession of the ultimate consumer does not affect the coverage of the act as far as the employees producing the products are concerned. The facts at the time that the products are being produced determine whether an employee is engaged in the production of goods for commerce, and at the time of the production of the containers they were clearly 'goods' within the meaning of the statute since they were not, at that point of time, in the actual physical possession of the ultimate consumer. All that the

and Department of Justice[58]—and accepted by the

term 'goods' quoted above is intended to accomplish is to protect ultimate consumers, other than producers, manufacturers, or processors of the goods in question from the 'hot goods' provision of section 15 (a) (1). This seems clear from the language of the statute. Thus section 15 (a) (1) makes it unlawful for any person 'to transport * * * (or) * * * ship * * * in commerce * * * any goods' produced in violation of the labor standards set up by the act. By defining 'goods' in section 3 (i) so as to exclude goods 'after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof,' the Congress made it clear that it did not intend to hold the ultimate consumer as a violator of section 15 (a) (1) if he should transport 'hot goods' across a State line. Thus, if a person purchases a pair of shoes from a retail store and carries the shoes across a State line, the purchaser is not, in our opinion, guilty of a violation of section 15 (a) (1) if the shoes were produced in violation of the wage or hours provisions of the statute. But Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the act by making delivery within the State into the actual physical possession of the ultimate consumer who transports or ships the goods outside the State. Thus, it is our opinion that employees engaged in building a boat for delivery to the purchaser at the boatyard are within the coverage of the act if the employer, at the time the boat is being built, intends, hopes or has reason to believe that the purchaser will sail it outside the State."

[58] See the following briefs filed by the Solicitor General in this Court: brief in opposition, *Hamlet Ice Co.* v. *Fleming*, 317 U. S. 634, 1942 Term, No. 104; brief in opposition, *Enterprise Box Co.* v. *Walling*, 316 U. S. 704, 1941 Term, No. 1275, p. 6; petition for certiorari (pp. 8-9), and brief on the merits, pp. 13-17, *Walling* v. *Reuter, Inc.*, 321 U. S. 671, 1943 Term, No. 436; brief on the merits, p. 17, in *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 1945 Term, No. 45; brief on the merits, *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 1947 Term, No. 590.

Circuit Courts of Appeals, including the Fifth Circuit, except in the *Silas Mason* case and one other decision in which this Court granted certiorari on this question, *inter alia*, but subsequently vacated the Fifth Circuit's decision on another ground. *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165, 170-171 (C.A. 4), certiorari denied, 317 U.S. 634; *Chapman* v. *Home Ice Co.*, 136 F. 2d 353, 355 (C.A. 6), certiorari denied, 320 U.S. 761; *Enterprise Box Co.* v. *Walling*, 125 F. 2d 897 (C.A. 5), certiorari denied, 316 U.S. 704; *Atlantic Co.* v. *Walling*, 131 F. 2d 518, 521 (C.A. 5). Contra: *Walling* v. *Reuter, Inc.*, 137 F. 2d 315 (C.A. 5), judgment vacated, 321 U.S. 671.[59] Many other decisions which contain

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[59] *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100 (C.A. 2), is not to the contrary. The employees of the contractor there held not subject to the Act were installing, servicing, and maintaining equipment on war vessels owned by the United States. After having held, we think erroneously, that the subsequent movements of the vessels could not be regarded as interstate or foreign commerce (as to which see Point IV, *supra*, pp. 117-130), the court concluded (163 F. 2d at 103-104) that the employees were working on the goods after their delivery to the possession of the ultimate consumer, and not in the course of production for subsequent commerce. In that case, the court found that the work was performed after the equipment had "been delivered into [the] actual physical possession" of the United States "prior to the time when the plaintiffs did any work upon it", and that there was no commerce after this delivery to the United States. *Id.*, at 101-102. The opinion reaches the "opposite result" as to work on armed cargo transports which it found to be instruments of commerce and not of war. As to these the court found that the United States was a processor of the equipment for commerce (*id.*, at 104). The court was clearly

no specific reference to Section 3(i) hold the Act applicable to employees engaged in production for commerce in identical or similar circumstances, although the "goods" being worked on were owned by the "ultimate consumer."[60]

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therefore not misinterpreting Section 3 (i) as excepting the production of goods before their delivery to the ultimate consumer for interstate transportation; on its understanding of "commerce", it had no such case before it, and its opinion was not addressed to any such situation. See also *Phillips* v. *Star Overall Co.*, 149 F. 2d 416 (C. A. 2), certiorari denied, 327 U. S. 780.

[60] *Bell* v. *Porter*, 159 F. 2d 117 (C. A. 7), certiorari denied, 330 U. S. 813; *Landreth* v. *Ford, Bacon & Davis*, 147 F. 2d 446 (C. A. 8); *Joshua Hendy Corp.* v. *Mills*, 169 F. 2d 898 (C. A. 9); *Anderson* v. *Federal Cartridge Corp.*, 62 F. Supp. 775 (D. Minn.), affirmed, 156 F. 2d 681 (C. A. 8); *Anderson* v. *Federal Cartridge Corp.*, 72 F. Supp. 639 (D. Minn.); *Umthun* v. *Day & Zimmerman*, 235 Iowa 293, 16 N. W. 2d 258; *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28 (S. D. Iowa); *Jackson* v. *Northwest Airlines*, 75 F. Supp. 32 (D. Minn.); *Roland* v. *United Airlines*, 75 F. Supp. 25 (N. D. Ill.); *Sweetman* v. *Remington Rand*, 65 F. Supp. 940 (S. D. Ill.); *Reid* v. *Day & Zimmerman*, 73 F. Supp. 892 (S. D. Iowa); *Lasater* v. *Hercules Powder Co.*, 73 F. Supp. 264 (E. D. Tenn.); *Bailey* v. *Porter*, 83 F. Supp. 988 (N. D. Ill.); *Ware* v. *Goodyear Engineering Corp.*, 6 W. H. Cases 160 (S. D. Ind., 1946); *Mochl* v. *E. I. DuPont De Nemours & Co.*, 84 F. Supp. 427 (N. D. Ill.); *Brown* v. *Consolidated Vultee Aircraft Corp.*, 80 F. Supp. 257 (W. D. Ky.); *Burke* v. *Mesta Machine Co.*, 79 F. Supp. 588 (W. D. Pa.); *Bauler* v. *Pressed Steel Car Co.*, 81 F. Supp. 172 (N. D. Ill.); *Bumpus* v. *Remington Arms Co.*, 77 F. Supp. 94 (W. D. Mo.); *Belanger* v. *Hopeman Bros.*, 6 W. H. Cases 616 (D. Maine 1947); *McCumsky* v. *Norden, Inc.*, 7 W. H. Cases 142 (N. Y. S. Ct. 1947); *Simkins* v. *Elmhurst Contracting Co.*, 181 Misc. 791, affirmed, 181 Misc. 793, affirmed 268 App. Div. 858; *Hen-*

The *Hamlet Ice*, *Home Ice*, and *Atlantic* cases each involved manufacturers of ice who sold it within the state to interstate railroads for consumption in refrigerating railroad cars. Judge Soper's opinion for the Fourth Circuit in the *Hamlet* case, which was followed in the other two cases, rejects the argument that delivery to the consumer exempts the producer; his opinion states (127 F. 2d at 170-171):

> The appellant claims in addition that its activities are outside the statutory scheme on the particular ground that all the goods it produces are delivered to the ultimate consumer and are therefore excluded by the definition of goods set out in § 3 (i) of the Act. * * *
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> The contention is that the word "goods" is subject to the exception wherever it occurs in the Act, and therefore the Ice Company produces nothing and sells nothing within the intendment of the Act. We do not think this argument is sound. It disregards the precise terms of the section that the goods excluded are not those in the possession of the maker but "goods *after* their delivery into the actual physical possession of the ultimate consumer". Goods in the course of production are

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derson v. *Bechtel-McCone Corp.*, 7 W. H. Cases 107 (N. D. Ala., 1947); *O'Riordan* v. *Helmers, Inc.*, 6 W. H. Cases 961 (N. Y. C. Ct., 1947); *Tiller* v. *Anchor Optical Corp.*, 6 W. H. Cases 655 (S. D. N. Y., 1947)

> therefore not expressly excluded and exclusion, we think, should not be implied. * * * It seems clear that the exclusion clause was intended to apply only to goods which, having come into the hands of the ultimate consumer, have been withdrawn from further traffic and sale, so that interstate transportation of the goods may take place without responsibility for a prior production in violation of the standards of the Act. This narrow purpose is evidenced by limiting the exclusion to "the ultimate consumer * * * other than a producer, manufacturer, or processor thereof".

Under the terms of the exclusionary clause, the applicability of the exemption necessarily depends upon two conditions: (1) that the United States was not "a producer, manufacturer, or processor" of the goods, and (2) that the goods were in "the actual physical possession" of the United States as an "ultimate consumer." If, as respondents contend, the United States were the real employer here and at all times in control of the operations, then the United States would clearly be "a producer, manufacturer, or processor" of the goods in question and condition (1) would not have been met. Thus, Section 3 (i) can be relied upon only as an alternative defense in the event that the respondents, and not the United States, are held to be the employer-producers. But in this event, condition (2) could not be met, for the goods while being worked on were obviously in "the actual physical possession" of the producer, not the consumer.

The use of the words "actual physical possession" negates the idea that mere title or ownership suffices. The terms of the contract between respondent and the United States in each of the instant cases make it clear that only title, and not physical possession, was retained by the United States during the performance of the contract. Thus, the contract provided that the contracting officer (representing the Government) "shall at all times have access to the premises, work and materials" and "shall at all times be afforded proper facilities for inspection of the work" (*Powell*, R. 788; *Aaron*, 2 R. 64; *Creel*, R. 320); it further provides that if the contract is terminated due to the contractor's fault, the contracting officer "may enter upon the premises and take possession" of the plant, the equipment and materials (*Powell*, R. 781; *Aaron*, 2 R. 59; *Creel*, R. 316). These provisions are inconsistent with the contention that the Government retained "actual physical possession" of the materials and goods during the performance of the contract. Supplemental contracts specifically stated, "It is recognized that property (including without limitation machine tools and processing equipment, manufacturing aids, raw, manufactured scrap and waste materials) title of which is or may be hereafter become vested in the Government, * * * will be in the care, custody, or possession of the Contractor in connection with the performance of the contract" (*Powell*, R. 833, 834; *Creel*, R. 343, 352). These facts were

recognized by the Eighth Circuit, which expressly found in its opinion in the *Powell* case that there was "no serious dispute" that the Cartridge Company, and not the Government, "had the actual physical possession of the material and products thereof" (174 F. 2d at 720). In the *Aaron* case, the respondent indicated, in response to plaintiffs' interrogations, that after raw materials shipped to the plant had been inspected and accepted and after the Ordnance Department had certified the contractor's receiving and inspection report, "the contractor stored the materials for use in accordance with the contract" (2 R. 141).

Therefore, it seems clear that during the course of production the materials being worked on were in the "actual physical possession" of the respondents. Under the literal language of the exclusionary provision, materials worked on remain "goods" as long as they are in the actual physical possession of a producer even if the producer be the ultimate consumer. Therefore it would seem to follow from the literal statutory language that the materials in the instant case were "goods."

This conclusion is confirmed by other provisions and the general framework of the Act, by the legislative history, and by the judicial decisions construing Section 3 (i).

There seems ample evidence on the face of the statute itself that there was no intent to exclude the productive process or the producer from the statutory standards. First, there is the explicit

provision in Section 3 (i) itself that the exclusion does not apply to a producer even if he be the ultimate consumer. There is also the comparable provision in Section 15 (a) (1), which protects a common carrier from liability for transportation of "hot" goods, and limits this protection to "goods *not produced by such common carrier.*" [Italics supplied.] Furthermore, while the constitutional authority for the statute rested primarily on the Congressional power directly to regulate or prohibit movement across State lines of tainted or "hot" goods, the basic policy of the Act, as expressed in the findings and declaration of policy (Section 2 (a)), was to eliminate the substandard labor conditions at their source—*in the factory or plant of the producer* for interstate shipment. See *United States* v. *Darby*, 312 U. S. 100, 117. While there are obvious reasons justifying protection of the innocent consumer from liability for substandard conditions maintained by a producer, no reasonable basis has been suggested for relieving a producer from liability for the substandard conditions in his own plant. To imply such release of the producer is inconsistent with the whole policy of the Act.

The legislative history affords further evidence that Congress advisedly phrased the exclusionary clause so as to protect the ultimate consumer without curtailing the liability or responsibility of the producer. In the bill as originally introduced in the Senate, the definition of "goods" provided

that it "shall not mean goods in the possession of the ultimate consumer thereof" (S. 2475, introduced May 24, 1937, 75th Cong., 1st sess., Section 2 (a) (21)). The representatives of the National Association of Manufacturers and of the Chamber of Commerce criticized this bill as affording adequate protection only to the ultimate consumer and not to producers, distributors and other businessmen. See statement of James A. Emery, General Counsel, National Association of Manufacturers, and George H. Davis, President, Chamber of Commerce of the United States, Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st sess., on S. 2475 and H. R. 7200, pp. 639, 936-937. The President of the Chamber of Commerce objected specifically on the ground that if a producer of grain maintained substandard conditions, the grain "in the hands of mill purchasers, and possibly in the hands of bakers that bought flour made from the wheat" would "contain that taint" and "only the ultimate consumer, who bought the bread to use at home, would be safe from Federal prosecution" (*id.* at 937). The General Counsel of the National Association of Manufacturers also indicated his understanding that the exclusionary clause in the definition of the term "goods" only "exempts the ultimate consumer from any criminal liability for any part he might play in the interstate transportation of such unfair goods" (*id.* at 639). Thus although

the representatives of manufacturers and businessmen urged that the protection not be thus limited but be extended generally to "innocent purchasers without notice" (*id.* at 937), Congress not only failed to broaden the protection but on the contrary narrowed the scope of the exclusionary clause by prefacing the word "possession" with the phrase "after their delivery into the actual physical," and by making explicit its limitation to an ultimate consumer "*other than a* producer, manufacturer or processor thereof". [italics supplied]. At the same time Congress dropped the provisions of earlier bills which would have permitted the Board to extend the protection under certain specified circumstances.[61]

[61] The recent 1949 amendments (Acts of October 26, 1949, P. L. 393, 81st Cong., 1st Sess.), which become effective on January 25, 1950, do include in Section 15(a)(1) (the section prohibiting shipment of "hot goods") a provision protecting "transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation." It may be noted that even this provision does not protect such a purchaser in its manufacturing or processing activities.

The manufacturers had no success in securing even this limited protection under the Act as originally enacted. Section 21(d) of S. 2475 as originally introduced would have permitted the administrative board to relieve others from liability for transportation of goods upon a finding by the board that they "had no reason to believe that any substandard labor condition existed in the production of such goods" or that such relief was "necessary to prevent undue hardship or economic waste and is not detrimental to the pub-

The interpretation of the Fifth Circuit would have serious effects not only in cases involving Government contractors, but in the application of the Act generally. Under this theory, any producer of goods plainly intended for shipment across State lines might secure the exemption simply because the consumer-purchaser took title or delivery of the goods before the interstate shipment. Thus, contrary to the consistent ruling of the courts,[62] the producer of ice for use in icing railroad cars, although knowing that the ice was destined for interstate shipment, would be exempt because the railroad took delivery of the ice before it crossed State lines. Other anomalous effects

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lic interest," provided that adequate provision was made for reparation of underpayments to employees. The bill as reported to the Senate July 8, 1937, after the hearings, included, in addition to the above-quoted sections, a provision authorizing the Board to issue certificates of compliance which might be relied upon by any purchaser or transporter of goods to demonstrate that he had "no reason to believe any substandard labor condition existed in the production of such goods." S. 2475 accompanying S. Rept. No. 884, Section 14 (c). Similar provisions were in the bill as reported to the House on August 6, 1937 (S. 2475), accompanying H. Rept. No. 1452, section 2 (a) (14), 18 (c), 14 (b). None of them appeared in the bill as passed by the House on May 24, 1938.

[62] See *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165, 170-171 (C.A. 4), certiorari denied, 317 U. S. 634; *Chapman* v. *Home Ice Co.*, 136 F. 2d 353, 355 (C.A. 6), certiorari denied, 320 U. S. 761; *Atlantic Co.* v. *Walling*, 131 F. 2d 518, 521 (C.A. 5); *Gordon* v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980, 986 (W.D.Ky.).

of this construction may be illustrated by reference to cases that have arisen under the Act. In *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4), one company maintained a dock at which it repaired barges owned by an affiliated company. Employees repairing the barges were considered engaged in the production of goods for commerce. Since the court considered the two companies as one, the ultimate consumer of the barges was also the producer thereof, and the consumer clause was therefore inapplicable. But under the theory of the Fifth Circuit, if the company which operated the barges was deemed independent of the company which repaired them, the same employees performing the same work would no longer be engaged in the production of "goods" because "the ultimate consumer" was not a producer thereof. Similarly, in *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C. A. 8), employees repairing trucks owned by their employer were held to be engaged in the production of goods for commerce because the trucks were used in interstate transportation. If the construction of the Fifth Circuit were adopted, employees working on such trucks would be working on "goods" if they were employed by the truck owner but not if they were employed by an independent contractor. This would make the exemption depend wholly upon "the capricious incidence of the act resulting from the accident of the industrial division of the whole process." See *Fleming* v. *Arsenal*

Building Corp., 125 F. 2d 278, 280 (C. A. 2), affirmed, 316 U. S. 517.

Section 3 (i) obviously was not calculated to achieve such capricious results. Such an interpretation, contrary to the established principle of strict construction of exemptions from this remedial Act (see *Phillips Co.* v. *Walling*, 324 U. S. 490, 493), would distort the simple restricted purpose of the exclusionary clause into far-reaching and irrational exemptions.

CONCLUSION

For the above reasons it is respectfully submitted that the decisions of the courts below are incorrect and that they cannot be sustained on any of the grounds here advanced by respondents.

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November 1949.

APPENDIX A

STATUTES INVOLVED

1. The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U.S.C. Sec. 201, are as follows:

SEC. 3. As used in this Act—

* * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, * * *.

(e) "Employee" includes any individual employed by an employer.

* * * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

2. The pertinent provisions of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, as amended by the Act of May 13, 1942, 56 Stat. 277, 41 U.S.C. 35) are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups

of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week: *Provided*, That the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an Act entitled "Fair Labor Standards Act of 1938."

3. The complete text of the Act of July 2, 1940, 54 Stat. 712, 50 U.S.C.A. App. 1171, (an Act to expedite the strengthening of the national defense) is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of

plants, buildings, facilities, utilities, and appurtenances thereto (including Government owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction, shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to

provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036; U.S.C., Supp. V, title 41, secs. 35-45) [the Walsh-Healey Act], shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

(b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, and, when he deems it necessary in the interest of the national defense, to lease, sell, or otherwise dispose of, any such plants, buildings, facilities, utilities, appurtenances thereto, and land, under such terms and conditions as he may deem advisable, and without regard to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412).

(c) Whenever, prior to July 1, 1942, the Secretary of War deems it necessary in the interest of the national defense, he is authorized, from appropriations available therefor, to advance payments to contractors for supplies or construction for the War Department in amounts not exceeding 30 per centum of the contract price of such supplies or construction. Such advances shall be made upon such terms and conditions and with such adequate security as the Secretary of War shall prescribe.

SEC. 2 (a) During the fiscal year 1941, all existing limitations with respect to the number of flying cadets in the Army Air Corps, and with respect to the number and rank of Reserve Air Corps officers who may be ordered to extended active duty with the Air Corps, shall be suspended.

(b) The President may, during the fiscal year 1941, assign officers and enlisted men to the various branches of the Army in such numbers as he considers necessary, irrespective of the limitations on the strength of any particular branch of the Army set forth in the National Defense Act of June 3, 1916, as amended: *Provided*, That no Negro, because of race, shall be excluded from enlistment in the Army for service with colored military units now organized or to be organized for such service.

SEC. 3. All existing limitations with respect to the number of serviceable airplanes, air-

ships, and free and captive balloons that may be equipped and maintained shall be suspended during the fiscal year 1941.

SEC. 4. (a) The Secretary of War is further authorized to employ such additional personnel at the seat of government and elsewhere, and to provide for such printing and binding, communication service, supplies, and travel expenses, as he may deem necessary to carry out the purposes of this Act: *Provided,* That until December 31, 1941, the Secretary of War may, if he finds it to be necessary for national-defense purposes, authorize the employment of supervising or construction engineers without regard to the requirements of civil-service laws, rules, or regulations: *Provided further,* That notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; U.S.C. title 5, sec. 652), the Secretary of War may remove from the classified civil service of the United States any employee of the Military Establishment forthwith upon a finding that such person has been guilty of conduct inimical to the public interest in the defense program of the United States and upon the giving of notice to such person of such charges: And *provided further,* That within thirty days after such removal such person shall have an opportunity personally to answer such charges in writing and to submit affidavits in support of such answer.

(b) Notwithstanding the provisions of any other law, the regular working hours of

laborers and mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics.

SEC. 5. The President is authorized, with or without advertising, through the appropriate agencies of the Government (1) to provide for emergencies affecting the national security and defense and for each and every purpose connected therewith, including all of the objects and purposes specified under any appropriation available or to be made available to the War Department for the fiscal years 1940 and 1941; (2) to provide for the furnishing of Government-owned facilities at privately owned plants; (3) to provide for the procurement and training of civilian personnel necessary in connection with the protection of critical and essential items of equipment and material and the use or operation thereof; and (4) to provide for the procurement of strategic and critical materials in accordance with the Act of June 7, 1939, but the aggregate amount to be used by the Presi-

dent for all such purposes shall not exceed $66,000,000. The President is further authorized, through such agencies, to enter into contracts for such purposes in an aggregate amount not exceeding $66,000,000. An account shall be kept of all expenditures made or authorized under this section, and a report thereon shall be submitted to the Congress at the beginning of each session subsequent to the third session of the Seventy-sixth Congress: *Provided*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036; U.S.C., Supp. V, title 41, secs. 35-45) [the Walsh-Healey Act], shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section.

SEC. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or

materials included in the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment. The authority granted in this section shall terminate June 30, 1942, unless the Congress shall otherwise provide.

APPENDIX B

EXCERPTS FROM MANUAL OF INSTRUCTIONS FOR THE ADMINISTRATION OF CONTRACTS (WAR DEPARTMENT; OFFICE OF THE CHIEF OF ORDNANCE; 1941):

SECTION I (GENERAL)

* * *

G. *Contracting Officer's Representatives' Relations with the Prime Contractor*

1. The relations between the Contracting Officer's Representative (including all members of his field organization) and the Contractor *must be strictly official.* All personnel in the office of the Contracting Officer's Representative will be impressed with the fact that no gratuities of any description can be offered or accepted by them. No officer or employee of the Government on duty at a Contractor's plant or at the site of a new Ordnance Facility will be permitted to influence the hire of men by Contractors, except as may be provided by the contract or by specifications applicable thereto. Upon reporting to a New Ordnance Facility, the Contracting Officer's Representative will present himself to the highest official of the Contractor's organization present thereat. He will introduce himself and discuss with such officials his general plans for performing his part of the work. If he had not obtained one prior to his arrival at the plant, he will obtain from the Contractor an organization chart showing the Contractor's key personnel and have a definite understanding with the Contractor, (which understanding should be re-

duced to writing for the mutual protection of both parties) as to which of the Contractor's key personnel are in charge of the various aspects of the work. The Contracting Officer's Representative will at all times maintain a friendly but firm, just, and tactful attitude toward Contractors and will insist that his subordinates do likewise.

3. *A Word of Warning*: Without minimizing the importance of the duties of the Contracting Officer's Representative, it is deemed advisable to remind him that it is *not* his function to take charge of the Contractor's plant or attempt to prescribe methods of manufacture. The Contractor is an independent Contractor, not an agent or employee of the Government. His contract requires him to produce a result, and the selection of the means to be employed in producing it is his responsibility. The Contracting Officer's Representative is stationed at the Contractor's plant, *first*, to see to it that the produce delivered by the Contractor is in accordance with Government drawings and specifications, *second*, to make sure that the Government gets what it pays for, and *third*, to safeguard the interests of the Contracting Officer and the Chief of Ordnance by verifying and preauditing every item for which Government funds are disbursed.

SECTION II (PRELIMINARY PREPARATIONS)

* * *

D. *Procurement of Civilian Personnel.*

1. The Contracting Officer or his Representative will arrange with the Civilian Personnel Division of the Ordnance Department for inspection of its lists of available civilian personnel. The Civilian Personnel Division will arrange an interview with prospective civilian employees and aid the Contracting Officer or his Representative in engaging selected applicants. A copy of "Civilian Personnel Regulations for Field Employees, Ordnance Dept., U. S. Army" No. 1294, as revised, is an essential part of the Contracting Officer's Representative's equipment. The present limited facilities of the Ordnance Department in Washington will preclude the securing of any but key civilians in the above-mentioned manner. The augmentation of the Contracting Officer's Representative's operating force will be made after the key personnel has arrived at its field station.

* * *

SECTION X (LABOR RELATIONS)

A. *In General.*

1. Under the provisions of Ordnance Department Cost-plus-a-fixed-fee Contracts the Contractor is responsible for the hiring, firing, and working conditions of employees on the project and, subject to the approval of the Contracting Officer, the determination of their wages and hours. The

Contractor must furnish and supervise all labor required for the performance of the work and the employees thus furnished are those of the Contractor and in no sense those of the Government. The Contractor is responsible for its relations with its employees.

2. It should be noted, however, that under a usual provision of Ordnance Department Cost-plus-a-fixed-fee Contracts, the Government reserves the right to require the Contractor to dismiss from the work any employee the Contracting Officer deems incompetent or whose retention he deems not in the public interest.

B. *War Department Representatives Not to Participate in Labor Disputes.*

1. No contracting Officer's Representative nor subordinate will be permitted to influence in any way the hire of employees by Contractors except as may be provided in the contract or the specifications applicable thereto.

2. Contracting Officer's Representatives or other representatives of the War Department will not participate in the arbitration, conciliation or mediation of existing or threatened labor disputes or any negotiations in connection therewith. Representatives of Contracting Officers shall exercise the utmost care to carry out the intent of this principle. He may take no action which may possibly be construed as prejudicial to or favoring the in-

terests of any party to an actual or potential labor dispute.

3. No Contracting Officer's Representative nor a subordinate of his will treat directly with any other Government department or agency in any matter affecting labor policy. All such matters will be referred to the Labor Section, Production Division, Industrial Service, Office of the Chief of Ordnance.

4. Contracting Officer's Representatives shall not fail to encourage sound and healthy relationships between Contractors and sub-contractors and their employees with respect to wages, hours, and other conditions of employment.

C. *War Department Agreement Regarding Labor on Defense Construction Projects.*

1. "Memorandum of Agreement between the Representatives of Government Agencies engaged in Defense Construction and the Building and Construction Trades Departments of the American Federation of Labor" pertaining to the labor policy should be followed in defense construction. This agreement is the result of conference between representatives of the Office of Production Management, the American Federation of Labor, the Maritime Commission, The Quartermaster Corps, the Corps of Engineers of the Army, Federal Works Agency, the Bureau of Yards and Docks of the Navy Department. It was approved by the

Council of Office of Production Management on July 22, 1941.

2. The agreement referred to has been announced as the policy of the War Department. The labor policy embodied in this agreement will be the guide in the formulation and awarding of all contracts for defense construction thereafter advertised or negotiated and will also be the guide in the administration and performance of existing Cost-plus-a-fixed-fee, Construction Contracts beginning with the first practicable pay period after it comes to attention of Contracting Officer's Representative.

3. Contracting Officer's Representatives will take all steps necessary to bring the subject agreement to the attention of Contractors.

* * *

SECTION XI (LABOR LAWS).

A. *Contractor's Responsibility for Compliance with Labor Laws.*

The Ordnance Department's Cost-plus-a-fixed-fee Contracts and the various Federal Labor Laws make it abundantly clear that the responsibility for compliance with the provisions of such laws is entirely the Contractor's. The Contracting Officer or his Representative may be consulted from time to time as to the details of such compliance and, indeed, in connection with his proper functions he may not ignore such violations of labor laws as

come to his attention, but he has absolutely no responsibility in connection with the Contractor's compliance therewith. This responsibility is solely the Contractor's and the Contracting Officer's Representative's function in this connection is merely advisory. In the event that questions arise under such laws as to which the Contracting Officer's Representative has no authoritative information, he should refer them to the Legal Section, Fiscal Division.

* * *

D. *Wages and Hours Regulations.*

1. Inasmuch as the primary concern and responsibility of the Ordnance Department in connection with Cost-plus a fixed fee Contracts is the operating or manufacturing portions thereof, most Ordnance Contracting Officer's Representatives' problems with respect to Federal Labor Laws will relate to those statutes applicable to manufacturing operations instead of the construction portions of the contract. These statutes include not only the Walsh-Healey ("Public Contracts") Act referred to in sub-section C. *f.* above, but also various statutes not referred to in the contracts themselves such as the Fair Labor Standards Act of 1938, and where appropriate the National Labor Relations Act, the Norris-LaGuardia Anti-Injunction Act, etc. Certain problems of frequent occurrence arising under the wages and hours provisions of the two former Acts are of major importance and are considered below.

2. Various state and local laws and regulations governing the wages and hours of employees may likewise be applicable to the Cost-plus-a-fixed-fee project. Although, as with Federal laws, it is the Contractor's responsibility to comply with such statutes, the Contracting Officer's Representative should take such steps as may be necessary to acquaint himself with the pertinent provision of such local regulatory measures.

3. Insofar as the establishment of New Ordnance Facilities is concerned, a point will be reached where construction and manufacturing operations will proceed simultaneously. During this transition period, when part of the employees of the Contractor will be engaged in activities or functions relating to construction and part of the employees will be engaged in activities or functions relating to production and operation, different Federal Labor Laws requiring compliance with different labor standards will be applicable to each category of workers (e. g., the Bacon-Davis Act to construction employees, and the Walsh-Healey Act to production employees). It is extremely important that there be brought to the attention of the Contractors the desirability of complete segregation during this period of the respective categories of workers as to duties, functions, and particularly employment records. Only by such a complete segregation can Contractors be in a position to evidence full compliance with the different

labor laws which may be applicable to the employees employed under the different titles of the contract.

* * *

G. *Fair Labor Standard Act Applicable to Cost-Plus-A-Fixed-Fee Contracts.*

1. The Fair Labor Standards Act (Wage-Hours Law) must also be considered applicable to Ordnance C. P. F. F. Contracts. The Fair Labor Standards Act, as well as the Walsh-Healey Act prescribes minimum wage, maximum hours, and child labor employment standards. It does not, as does the Walsh-Healey Act, provide for the regulation of health and safety.

2. Under date of May 9, 1941, the Administrator of the Wage and Hour Division, Department of Labor, advised the Office Chief of Ordnance as to the status of manufacturers on the Cost-plus-a fixed-fee Contracts as follows:

> "It is our opinion that the employees of the private manufacturer are within the general coverage of the Fair Labor Standards Act if the manufacturer, at the time of production, had reason to believe the War Department after receiving the products would transport them into interstate commerce. It is also our opinion that the provision contained in Section 3 (d) of the Act, excluding the United States from the coverage of the Act as an employer, does not exclude from the provisions of the statute a private Contractor with the

War Department of the character described above."

3. Although no provision relative to the Fair Labor Standards Act is included in Government contracts, Contractors are nevertheless required to comply with it as well as the Walsh-Healey Act insofar as each may be applicable. However, the statutes overlap and insofar as minimum wage, maximum hour, and child labor standards established by both these laws conflict, the determination by the Contractor of the status of particular employees or classes of employees with reference to such standards may be difficult. Some aids to a determination of the applicability of these conflicting requirements are therefore set forth below.

II. *Determining the Status of Individual Employees Under the Walsh-Healey Act and Fair Labor Standards Act.*

1. In resolving the overlap of the Walsh-Healey Act and the Fair Labor Standards Act for the purpose of determining their respective application, the full circumstances pertaining to the employment of each *individual* employee is controlling. Under both statutes determining coverage is an *individual* matter as to the nature of the employment of the particular employee and the classification or title which the employer may have is immaterial. Contracting Officer's Representatives will find it advantageous to approach these problems from this viewpoint.

2. In order to determine the status of a particular employee under the conflicting standards relating to wages and hours of these two statutes, the following general considerations are pertinent:

a. Has a minimum wage determination under the Walsh-Healey Act which is applicable to the particular Cost-plus-a-fixed-fee Contract been promulgated prior to the award of the Contract? Reference to the chart set forth in sub-section E above should provide an answer to this question.

b. If the answer is in the affirmative and the employee is not one of those specifically exempted from the act (cf. Regulations issued under the Act where such exemptions are particularized), he is then subject to the Walsh-Healey Act. Inasmuch as the Walsh-Healey Act prescribes a higher wage and overtime compensation for work in excess of eight hours in any one day, its requirements will prevail over those of the Fair Labor Standards Act. Such an employee must then be paid not less than the minimum wage prescribed in the determination and may not be worked in excess of eight hours in one day or 40 hours in one week without the payment of time and a half overtime compensation.

c. If, however, the answer to *a* above is in the negative and no applicable minimum wage determination had been made prior to the award of the Contract, the Walsh-Healey Act stipulation with

respect to minimum wages is inoperative for the life of the contract, with the result that either the Walsh-Healey Act or the Fair Labor Standards Act or both may be applicable. In such case, the regulations issued under the Walsh-Healey Act require the Contractor to pay to each employee covered by the Act who works for a part of a day of a given work week, one and one-half times the "basic hourly rate" or piece rate for hours worked over eight that day or over eight upon any day that week or for all hours he works over 40 during that week, whichever is greater. The employee, however, may also be covered by the Fair Labor Standards Act, which prescribes a minimum wage of 30¢ an hour, an overtime compensation for hours worked in excess of 40 per work week at "not less than one and one-half times the regular rate at which he is employed". Official interpretations under each Statute furnish formulas for satisfying their respective overtime requirements and calculating the wages or salaries due employees. These rulings are included in the Field Kit (see Section II) and should be consulted. That statute will apply which results in the greater yield to the employee.

d. In the event that an employee is included among those employees specifically exempted from the Walsh-Healey Act by the regulations issued thereunder (i. e., office, supervisory, custodial, and maintenance employees as defined in the Regula-

tions), and whether or not a minimum wage determination is applicable, the Walsh-Healey Act has no application to him whatsoever. In such case, inasmuch as the Eight Hour Law has no application to him, the Fair Labor Standards Act alone may be applicable to him.

I. *Fair Labor Standards Act—Wages and Hours.*

1. The Fair Labor Standards Act applies to every employee (except those specifically exempted thereunder) engaged in interstate commerce or in the production of goods for such commerce. Under this statute an employee is deemed engaged in "production" if he is employed in "any process or occupation necessary to the production" of goods. The interpretation of this definition is, at the present time, so broad as to include virtually all employees of Cost-plus-a-fixed-fee Contractors except those specifically exempted by the terms of the statute.

2. The minimum hourly wage which must be paid to those employees covered by this law is fixed at the present time at 30¢ an hour. Although the statute permits the fixing by wage order of a separate minimum wage standard for particular industries which may be higher than 30¢ an hour but not in excess of 40¢ an hour no such minimum wage has been established at the present time which is generally applicable to Cost-plus-a-fixed-fee Contractors. Thus, where no minimum wage deter-

mination under the Walsh-Healey Act is applicable, the only specific minimum wage which a Cost-plus-a-fixed-fee Contractor is required to pay under Federal Law is 30¢ an hour. Insofar as the payment of overtime compensation is concerned, however, the rule of the Department of Labor under the Walsh-Healey Act and the Fair Labor Standards Act referred to above is sub-paragraph *c* of paragraph 2 of sub-section H must not be ignored.

3. The Walsh-Healey Act prescribes an eight-hour day and a 40-hour week with time and a half payable for all hours worked in excess thereof under all contracts subject to that law. Although the Fair Labor Standards Act prescribed a maximum work week of 40 hours before overtime compensation is required, it contains no general limitation on the number of hours that may be worked in a single day. Thus, for example, watchmen or guards, who are specifically exempted from the Walsh-Healey Act by the regulations issued thereunder but who are subject to the Fair Labor Standards Act inasmuch as they are engaged in an activity "necessary to the production" of goods for commerce, may be worked as much as a period of 40 consecutive hours without the payment of overtime compensation, whereas if they were subject to the Walsh-Healey Act they would have to be paid overtime for all hours in excess of eight in any consecutive twenty-four hour period.

4. The Fair Labor Standards Act specifically exempts certain employees from its provisions. Of general application to Cost-plus-a-fixed-fee Contracts are those exemptions for employees employed in a bona fide executive, administrative or professional capacity as these terms have been defined by regulations issued under the Act. Contracting Officer's Representatives should consider the employees of the Contracting Officer subject to the provisions of the Fair Labor Standards Act unless and until it is demonstrated with reasonable conclusiveness that a given employee is within one of the several specific exemptions set forth in the statute.

5. In connection with the matter of compliance with the Fair Labor Standards Act and the Walsh-Healey Act by the Contractor, particular attention is invited to the record-keeping requirements established by regulations issued under each of these statutes. Only by keeping accounts and records as required by these regulations and indeed as required by other applicable statutes such as the Social Security Law, the Unemployment Insurance Laws of the States, etc.) can the Contractor hope to be able to demonstrate his compliance with the various statutes regulating unemployment relations.

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APPENDIX C

JOINT AGREEMENT OF THE WAR DEPARTMENT, THE NAVY DEPARTMENT, THE WAR PRODUCTION BOARD, THE MARITIME COMMISSION, THE DEPARTMENT OF LABOR, THE NATIONAL LABOR RELATIONS BOARD AND THE WAR MANPOWER COMMISSION, ON THE DESIRABILITY OF RETAINING EXISTING FEDERAL LEGISLATION RELATING TO OVERTIME PAY (JANUARY 25, 1943):

The War Department, Navy Department, War Production Board, Maritime Commission, Labor Department, National Labor Relations Board and the War Manpower Commission, being the agencies of the Federal Government most concerned with questions involving labor and production, have given continuous consideration to the problem raised by discussion to abolish the payment of overtime for work between 40 and 48 hours a week. The Senate Military Affairs Committee has called on a number of them to consider whether their experience indicates that such a measure would increase production. It is the best judgment of these departments and agencies, based on their individual and collective experience, that the abolition of existing overtime pay provisions of Federal legislation would hamper the war effort. These departments and agencies feel that what amounts to a wage cut as a result of the abolition of time and a half pay for overtime would not aid production or the war effort, would be contrary to the wage stabilization program, and would not relieve manpower shortage.

The following facts lead to this conclusion:

1. The war industries have almost universally scheduled shifts of 48 to 50 or 55 hours of work; in some industries 60 and even 70 hours are scheduled. The only significant exceptions are continuous-process industries like steel and smelting, which operate around the clock. Some plants do not receive sufficient raw materials to work their full force 48 hours regularly. In the major war industries man-hour production has increased and is one of the causes for the three-fold increase in our total monthly war production since Pearl Harbor.

2. The abolition of overtime pay would bring about terriffic pressure for an upward revision of basic wage rates to offset the loss of overtime pay. It would also probably cause dissatisfaction, a lowered morale and result in loss of production.

General wage increases in industries now working overtime would probably affect wage rates in most other industries as well. The cost of such general wage increases, therefore, would be much greater than the present cost of overtime, which is only paid for work beyond 40 hours. Such increased basic rates could only be reduced with great difficulty after the war, whereas overtime as now paid rises and falls with the need for production and will eliminate itself when the war demand is satisfied.

3. The effect of the increase in labor cost due to overtime premium payments is sometimes exaggerated. For example, the increase is about 8 percent in changing from a 40 to 48 hour week. This increase in labor cost is offset in whole or in part by the savings in overhead cost per unit of product that necessarily result from the increase in production made possible by longer hours of work. The increase in earnings resulting from overtime payments has also made it easier to introduce labor-saving devices that have been developed to handle the larger volumes of production.

4. Some non-war industries are now scheduling less than 40 hours of work a week. Obviously such short hours are not the result of legislative overtime requirements. Other non-war industries are working less than 48 hours a week.

To relieve growing shortages of manpower it is desirable in the interest of the conservation of manpower that workers in these industries be employed on 48-hour schedules as rapidly as practicable in order that any excess manpower may be transferred to war industries or the armed forces. Manpower shortages in tight labor market areas already are being met by the extension of work schedules in one establishment after another as the need arises.

The manpower problem in war production centers would not be relieved by requiring the instantaneous application of 48-hour schedules in areas

which have not been substantially affected by the war program. A simultaneous introduction of 48-hour schedules in all establishments would result in unemployment in many areas. While overtime is being rapidly extended to additional establishments, the opportunity for overtime work in vital war industries is, and is likely to remain, a significant natural economic force attracting manpower from non-war industries.

5. Pursuant to an Act of Congress wage stabilization is now a part of the national policy. Overtime pay was made a part of that policy by Congress. To remove the overtime pay would disrupt and break down the entire wage stabilization program and would lead to chaos.

APPENDIX D

EXCERPTS FROM THE ARMY ORDNANCE PROCUREMENT INSTRUCTIONS [2 WAR LAW SERVICE (C.C.H.)]

9,002. [24,843] *Ordnance Department representatives.*

9,002.1 *Hiring practices.*—While the responsibility for hiring is on the contractor exclusively, Ordnance Department representatives will urge contractors fully to utilize Ordnance and other governmental facilities for the solution of manpower and labor supply problems, and will assist contractors with respect thereto.

9,002.2. *Participation in labor disputes.*—Contractors have the primary responsibility for the handling of their own labor relations in such a manner as to avoid labor disputes and obtain maximum war production. Ordnance Department representatives will not participate in the arbitration, conciliation or mediation of labor disputes or any negotiations in connection therewith. However, without in any way taking a position as to the merits of a dispute, or any action which might be construed as prejudicial to or favoring the interests of any party, such representatives should:

a. Utilize all available sources of information with respect to a dispute, including interested labor and industry representatives.

b. Make known to all parties to the dispute the Ordnance interest in uninterrupted productions.

c. Suggest to all parties to the dispute the use of the facilities of the Federal and State conciliation and mediation agencies.

d. Maintain liaison with Federal and State agencies and supply such agencies with such information and assistance as such agencies may request in the discharge of their functions.

e. Where deemed advisable, contact appropriate Service Command Labor Branch officer for assistance in carrying out the functions outlined in (a) through (d) above. Where it is desired to refer a matter to a Service Command Labor Branch, referral of a case involving a particular plant should be to the Service Command within the geographical jurisdiction of which the plant is located. Where a problem of a general nature not involving a particular plant arises, referral should be to the Service Command within the geographical jurisdiction of which the Office of the Ordnance representative is located. Ordnance representatives shall exercise the utmost care to carry out the intent of this instruction and shall at all times consult with and keep fully advised the Labor Branch as regards their actions in compliance therewith.

[As amended March 1, 1943.]

9.002.3. *Relationship to contractors.*—Contracting officers' representatives shall encourage contractors to formulate sound and healthy labor relations policies with respect to wages, hours, and other

conditions of employment. They will, however, always recognize that prime responsibility for labor relations is the responsibility of the contractor.

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9,104. [24,865] *The contractor.*

9,104.1. *Responsibility.*—Each operator is an independent contractor charged with final responsibility for safe and maximum production. Inasmuch as labor relations is a prime factor affecting production, it is the responsibility of the contractor to formulate such labor relations policy, of necessity conforming to the Statement of Labor Policy and applicable federal laws, as in its judgment best discharges this responsibility.

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9,154. [24,882] *Relation of Walsh-Healey Act to other statutes.*

9,154.1. *Fair Labor Standards Act.*—Both the Fair Labor Standards Act and the Walsh-Healey Act prescribe minimum wage, maximum hours, and child labor employment standards. The Walsh-Healey Act, however, unlike the Fair Labor Standards Act, also provides for the regulation of health and safety. The statutes overlap in many cases and to the extent the wage, hour and child labor standards established by both conflict, the determination of the status of particular employees or classes of employees with reference to such standards may be difficult.

9,154.2. *Contract stipulations of Fair Labor Standards Act.*—Unlike the Walsh-Healey Act there is no requirement in the Fair Labor Standards Act for the inclusion of contract provisions.

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9,160. [24,888]. *Investigations by wage and hour inspectors.*—Subject to existing security regulations governing admission of visitors to plants (See Headquarters, Army Service Forces, Circular No. 90, dated 28 November 1942, Subject: "Visits to Plants and Facilities Important to the War Effort," as amended by Headquarters, Army Service Forces, Circular No. 51, dated 20 July 1943, same subject) representatives of the Wage and Hour Division of the United States Department of Labor will be accorded access to facilities and to records of cost-plus-a-fixed-fee contractors for the purpose of making investigations to determine applicability of and compliance with the Fair Labor Standards Act. Access will be accorded such inspectors, as aforesaid, irrespective of whether claims have been asserted or litigation instituted by employees. Investigations by Wage and Hour Division inspectors will be conducted at such time and in such manner as to interrupt or interfere least with operations. They should be confined wherever possible to the inspection of records in the office of the contractor. Inspections of the areas in the facility where construction or production is in progress will be held to a minimum. Nec-

essary interviewing of employees should, wherever possible, be conducted outside work hours or at such other times as will interfere least with construction or production operations. [Added February 1, 1944.]

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50,002 [25,203.] *Duties of Commanding Officers and Contracting Officer's Representative.*

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50,002.11. In line with the above, it is important that the organization built up by the contracting officer's representative should be the minimum required to protect the interest of the Government. In general, the plant or depot managers and executives of the contractor should be men of considerable experience and have a well-trained staff at their disposal. The Government in entering into a contract with a particular company is paying for this experience and background, which should be utilized to the fullest extent. A cardinal principle to be observed is that the contractor is being paid a fee to perform the work, and while it is not intended that the Government do the job for which the contractor has been engaged, it is the responsibility of the contracting officer's representative to insure that the contractor does it well.

50,002.12. The relationship between the contracting officer's representative and the contractor's personnel is most delicate. The contracting officer's representative at all times should deal with the top

representative of the contractor at the particular plant, works or depot, in so far as the formulation of policies are concerned. Within the framework of the policies adopted as mutually agreed upon by the contracting officer's representative and the senior officer representing the contractor, it would be expected that key personnel on the staff of both maintain direct liaison with each other respectively in so far as the day to day problems of the plant or depot arise. The contracting officer's representative is the only Government official on the project who has any authority to criticize the contractor or any of his personnel and this he should do by direct contact, either verbally with, or in official written communication addressed to, the chief resident official of the contractor's organization. No restrictions should be placed by the staff of the contracting officer's representative upon the personnel of the contractor without the full knowledge and consent of the contracting officer's representative and then only in his name. Care is to be exercised by the staff of the contracting officer's representative in making suggestions lest they be considered as instructions except in those matters as occur in connection with day to day problems and which as a matter of policy have been agreed upon by the contracting officer's representative and the senior representative of the contractor at the particular plant, works, or depots. In case of differing opinions, the businesslike conference method

should be employed. It is preferred that the contracting officer's representative achieve the desired results not by peremptory orders, but by guidance and suggestions. It is highly important that the contracting officer's representative exercise the greatest care in seeing that neither he nor his staff assumes the responsibility of the contractor by making decisions which should be made by the contractor. The Storage Branch, Field Service Office, Chief of Ordnance—Detroit, products centers, the materiel branches, and the suboffices are equipped to be of special assistance in matters arising out of the foregoing relationship.

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